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In the Supreme Court of the United States

CITY OF MODESTO, *ET AL.*,
Petitioners,

v.

ENRIQUE SANCHEZ, EMMA PINEDO, AND SALVADOR VERA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the California Voting Rights Act, by invalidating at-large voting systems solely on the basis of racially polarized voting, is a racial classification subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment?

2. Whether the California Voting Rights Act, by invalidating at-large voting systems solely on the basis of racially polarized voting where no racial injury or racial discrimination exists, is facially unconstitutional pursuant to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioners City of Modesto, Jean Z[illegible]r, Jim Ridenour, Bob Dunbar, Janice Keating, Garrad Ma[illegible]h, Will O'Bryant, Denny Jackman and Brad Hawn were defendants in Stanislaus County Superior Court and respondents in the California Cou[illegible] of Appeal.

Respondents Enrique Sanchez, Emma Pinedo and Salvador Vera were plaintiffs in Stanislaus County Superior Court and appellants in the California Court of Appeal.

RULE 29.6 STATEMENT

Because no petitioner is a corporation, there are no corporate relationships to disclose under Supreme Court Rule 29.6.

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CITY OF MODESTO, CALIFORNIA, *et al.*,
Petitioners,

v.

ENRIQUE SANCHEZ, EMMA PINEDO, AND SALVADOR VERA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the California Court of Appeal entered on December 6, 2006.

OPINIONS BELOW

The decision of California Superior Court of Stanislaus County granting Petitioners' motion for judgment on the pleadings is not reported. (App. 41a-51a.) The Opinion of the California Court of Appeal reversing the Superior Court's decision is reported at 51 Cal. Rptr. 3d 821 (2006). (App. 1a-40a.) The Order of the California Supreme Court denying discretionary review is reported at 2007 Cal. LEXIS 2772 (2007). (App. 52a.)

JURISDICTION

The California Supreme Court denied discretionary review on March 21, 2007. (App. 52a.) On June 7, 2007, Justice Kennedy extended the time within which to file a

petition for a writ of certiorari to July 19, 2007. (App. 53a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

B. State Statutory Provisions

The California Voting Rights Act of 2001 is set forth in California Elections Code Sections 14025-14032. The complete text of these statutes is reproduced in the Appendix. (App. 55a-59a.)

STATEMENT OF THE CASE

Petitioners are the City of Modesto, Modesto City Councilmembers and the Modesto City Clerk. (App. 62a-63a.) Respondents are Latino residents and eligible voters of the City of Modesto in Stanislaus County, California. (App. 61a-62a, 70a-71a.)

The Modesto City Council consists of seven Councilmembers, one of whom is the mayor. (App. 63a.) All are elected at-large. (App. 64a.) The City of Modesto is a charter city and its at-large election system is contained in its charter and was approved by the City's voters. (App. 64a, 77a-80a.) In 2001, voters of Modesto rejected a ballot measure for district-based elections. (App. 66a-67a.)

Respondents filed suit on June 3, 2004, solely on the basis of the California Voting Rights Act ("CVRA" or

"Act"). (App. 60a.) The complaint asserts that Modesto's at-large election system, together with racially polarized voting, results in vote dilution under the Act.[1] *Id.* Plaintiffs seek district elections as a remedy. *Id.*, 7a.

The City asserted as an affirmative defense and as a cross-claim that the CVRA was unconstitutional under the Fourteenth Amendment. (App. 73a-76a; 20a). The Stanislaus County Superior Court granted the City's motion for judgment on the pleadings, holding that the Act is subject to strict scrutiny. (App. 43a.) The Superior Court then held that the legislative record of the Act lacks any findings of need that would justify the elimination of the majority district requirement for proving vote dilution under federal law and thus violated the Fourteenth Amendment. (App. 46a.) The Superior Court also invalidated the CVRA because it was not time limited and because its "liability without remedy" provision would result in attorneys' fees and expert witness costs that would be an unconstitutional gift of public funds. (App. 42a-43a.)

The California Court of Appeal, Fifth Appellate District, reversed. The state appellate court upheld the Act under rational basis review. (App. 24a.) It ruled that the CVRA is not a racial classification because it is a remedial, race neutral, "race-conscious" antidiscrimination statute that applies equally to all races. (App. 3a.) It then held that

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[1] California Elections Code Section 14027 provides that an at-large method of election may not be imposed where it impairs the ability of a protected class "to elect" candidates of its choice or "to influence" the outcome of an election. Elections Code Section 14028(a) provides that a violation of Section 14027 is established "if it is shown that racially polarized voting occurs."

The fact that members of a protected class are not geographically compact "may not preclude a finding of ... a violation of Section 14027 and this section." Section 14028(c). Minority electoral defeat is not required. Section 14028(b). Proof of intent to discriminate against a protected class is not required. Section 14028(d).

"curing vote dilution" was a legitimate state interest under its relaxed standard of review. (App. 24a.) The California Supreme Court denied petitioners' request for review. (App. 52a.)

REASONS FOR GRANTING THE WRIT

This Petition seeks plenary review and reversal of the California Court of Appeal decision below upholding the constitutionality of the California Voting Rights Act.

The Act is a significant departure from the federal Voting Rights Act ("VRA"), 42 U.S.C. § 1973. It invalidates at-large election systems solely on the basis of racially polarized voting. *See* Section 14028(a) ("A violation of Section 14027 is established if it is shown that racially polarized voting occurs"). Under the Act, racially polarized voting alone is regarded as vote dilution in at-large systems in all cases.

The Act does not require proof that a challenging minority group can form a single member district in which they will be the majority of the voters able to elect their preferred candidates, as required to prove vote dilution under both the federal VRA and this Court's pre-VRA Fourteenth Amendment cases. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971). It does not require proof of minority electoral defeat, also necessary to prove vote dilution under federal law. *Thornburg*, 478 U.S. at 48. It expressly authorizes "ability to influence" claims. Section 14027.

Thus, the Act does not require proof of "vote dilution" or racial discrimination in voting, as this Court has defined those terms under the federal Voting Rights Act and the Fourteenth Amendment. Indeed, it invalidates at-large election systems in expansive new circumstances that this

Court expressly has held do not constitute vote dilution, racial injury or racial discrimination in voting under the VRA or the 14th Amendment. The Act is not an antidiscrimination statute because it quite plainly invalidates at-large systems, solely on the basis of racially polarized voting, where no racial injury or racial discrimination exists.

Racially polarized voting is an explicit racial classification subject to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment. The opinion below erroneously applied deferential rational basis review to the Act because it purportedly is a remedial, race neutral, race-conscious antidiscrimination measure that applies equally to all races. This holding directly conflicts with this Court's racial classification cases, which explicitly reject such reasons for a lesser standard of review. The opinion below also committed fundamental error in simply accepting at face value the Legislature's wholly unsupported conclusion that racially polarized voting by itself is harmful or constitutes vote dilution.

The Act's racial classifications cannot survive strict scrutiny review. States may enact legislation to remedy racial discrimination only where there is prior intentional discrimination or they make findings that demonstrate a "strong basis in evidence" of racial harm. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 497, 500 (1989); *Miller v. Johnson*, 515 U.S. 900, 922 (1995).

Fatally, however, the California Legislature did not make <u>any</u> findings that racially polarized voting by itself causes racial harm or injury in the absence of a majority district or minority electoral defeat, that would justify the invalidation of at-large systems, solely on the basis of race, as a remedy for discrimination. Without any findings, no court can conclude that the Act serves a compelling interest

or is narrowly tailored to advance any such interest. The Act is facially unconstitutional.

The need for review and reversal of the state court decision below is compelling. The Act will lead to widespread unjustified use of race to invalidate literally thousands of at-large systems in California cities, school districts and special districts, without proof of racial injury (App. 148a.) No public entity that elects at-large can survive challenge under the Act because, with California's multitudinous racial and ethnic, ancestry and language groups, there always will be groups that vote differently from one another. Public entities all over California will be subjected to attack under the Act, and considerable financial loss. The Act not only authorizes the award of fees and costs to prevailing plaintiffs but also expert witness fees and costs not typically recoverable under civil rights statutes. Section 14030. Many public entities will change their systems simply to avoid the potential cost. Given the national importance of the issues presented, and the practical consequences of the decision below in our most populous state, this Court's review is plainly warranted.

I. THE OPINION BELOW, IN FAILING TO APPLY STRICT SCRUTINY, DIRECTLY CONTRADICTS THIS COURT'S PRECEDENTS

A. The Act Operates Entirely And Only On The Basis Of Express Racial Classifications

Under the 14th Amendment, "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Under strict scrutiny, racial classifications are constitutional only if they are narrowly

tailored measures that further compelling governmental interests. *Id.*

No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. *Shaw v. Reno*, 509 U.S. 630, 642 (1993). Express racial classifications are "immediately" and "inherently" suspect (*Id.*; *Adarand*, 515 U.S. at 223) and are "presumptively" unconstitutional. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Miller*, 515 U.S. at 927.

The Act unquestionably classifies individuals by race. Elections Code Section 14032 authorizes any voter "who is a member of a protected class" to challenge an at-large election system under the Act. Section 14026(d) defines a "protected class" to mean "a class of voters who are members of a race, color or language minority group" as defined in the federal Voting Rights Act. (Emphasis added.) Thus, a voter may sue under the Act only on the basis of his or her race or ethnicity, and his or her membership in a "protected" racial, ethnic or language group. A voter cannot challenge at-large elections individually without regard to his or her racial identity, or on the basis of political affiliation, religion, gender, disability or any group basis other than race. The Act classifies all individuals who may sue on the basis of race.

More importantly, the Act invalidates at-large systems solely on the basis of race, *i.e.*, "racially polarized voting." Elections Code §§ 14026(e) and 14028. Elections Code Section 14028(a) provides, "A violation of Section 14027 is established if it is shown that racially polarized voting occurs ...". Nothing more is required. Race, then, is the sole basis of liability. Race is "the factor," "decisive by itself" and "determinative standing alone." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1* ("*Parents*"), 551 U.S. ___, 127 S. Ct. 2738, 2753 (2007). Racially polarized voting is an express racial classification that explicitly

distinguishes between individuals on racial grounds and thus falls within the core prohibition of the Equal Protection Clause. *Shaw*, 509 U.S. at 642; *Miller*, 515 U.S. at 904-05.

Racially polarized voting means that individuals in different racial groups vote differently from each other. Elections Code 14026(e) defines racially polarized voting as "voting in which there is a difference ... in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate."

By definition, racially polarized voting divides and separates individuals on the basis of race and assigns them to specific race, color and language minority groups. Racially polarized voting then examines and compares the voting patterns of these respective racial groups. In this case, for example, the Complaint groups Latino voters against all Caucasian and other voters. (App. 60a-61a, 65a.) The Act will invalidate an at-large election system if any racial group votes differently than another racial group. On every application where racially polarized voting is proven, the Act necessarily will benefit a plaintiff racial group seeking districts (or some other alternate system) at the expense of other individuals and racial groups who would prefer to retain the at-large system. It undeniably distributes burdens and benefits solely on account of race, *i.e.*, the voting behavior of racial groups. Racially polarized voting inexorably leads to "different treatment based on a classification." *Parents*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

This Court's precedents hold that government must treat citizens as individuals, not as members of a racial group or class. *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995); *Miller*, 515 U.S. at 911. It follows from this principle that "all governmental action based on race — a group

classification long recognized as 'in most circumstances irrelevant and therefore prohibited' — should be subjected to detailed judicial inquiry." *Adarand*, 515 U.S. at 227 (citation omitted).

The reason is that racial classifications "of any sort" pose the risk of lasting harm to our society. *Shaw*, 509 U.S. at 657. Racial classifications with respect to voting carry particular dangers. *Id.*

The Act operates entirely and only on the basis of racial classifications. Race alone determines who may sue and whether or not at-large systems are invalidated. Strict scrutiny is required.

B. The Opinion Below, In Concluding That The Act Contains No Racial Classification, Conflicts With This Court's Racial Classification Cases

Contrary to this Court's holdings, the opinion below incorrectly held that the Act is not a racial classification because it purportedly is a remedial, race neutral, "race conscious" antidiscrimination statute that applies equally to all races. This Court has never held that race-conscious state statutes or policies containing express racial classifications are immune to strict scrutiny review. Quite the contrary, this Court held that Michigan Law School's "race-conscious" admissions policy expressly using race as one of many factors was subject to strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 341-342 (2003). *See also Parents*, 127 S. Ct. at 2753-54, and at 2792, 2796-97 (Kennedy, J., concurring) (comparing race conscious measures that do not rely on racial classifications).

The opinion below erroneously holds that, because members of all racial groups purportedly may sue under the Act, it treats all races equally, and therefore strict scrutiny is inapplicable. That conclusion directly conflicts with this

Court's racial classification cases. In *Johnson v. California*, 543 U.S. 499, 506 (2005), the Court rejected the argument that neutral racial classifications that neither benefit nor burden one racial group or individual more than any other group or individual receive relaxed review. California defended its prison segregation policy in *Johnson* on the basis that all prisoners were equally segregated. Nonetheless, this Court held that racial classifications receive close scrutiny even when they may be said to "burden or benefit the races equally" or are "neutral." *Id.*, citing *Shaw*, 509 U.S. at 651, and *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

Following *Johnson*, the Ninth Circuit applied strict scrutiny to an allegedly neutral racial tiebreaker in school admissions that did not burden or benefit any particular racial group more than another. *Parents*, 426 F.3d 1162, 1172-1173 esp. n.12 (9th Cir. 2005) (en banc), *rev'd*, 551 U.S. ___, 127 S. Ct. 2738 (2007). The Ninth Circuit concluded that the racial tiebreaker was narrowly tailored to achieve a compelling interest in racial diversity in education. Reversing the judgment, five Justices of this Court applied strict scrutiny. *Parents*, 127 S. Ct. at 2751-52 and at 2785 (Kennedy, J., concurring.) The decision below cannot be squared with *Johnson* and *Parents*, which was issued after the decision in the present case.[2]

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[2] Nor can it be squared with the Court's earlier decisions, most notably *McLaughlin v. Florida*, 379 U.S. 184, 188-190 (1964) (striking down interracial cohabitation ban) and *Loving v. Virginia*, 388 U.S. 1, 8, 10 (1967) (striking down interracial marriage ban). The state statutes in *Loving* and *McLaughlin* did not single out any race for special advantage or disadvantage but imposed liability "only because [the people affected] were of different races ... their conduct would not have been illegal had they both been white, or both Negroes." *McLaughlin*, 379 U.S. at 198 (Justices Stewart and Douglas concurring); *see also*, *Loving*, 388 U.S. at 11-12.

The opinion below plainly is in error in accepting at face value the Legislature's characterization of the Act as an antidiscrimination measure. This Court repeatedly has said that legislative expressions of benign or remedial purpose are not determinative and in fact given "little or no weight." *Croson*, 488 U.S. at 500. The *Croson* Court declared that mere recitation of a benign or compensatory purpose would impermissibly insulate state racial classifications from strict scrutiny. *Id.* at 490. Because racial classifications are suspect, "simple legislative assurances of good intention cannot suffice." *Id.* at 500. There is no place in equal protection analysis for "blind judicial deference to legislative or executive pronouncements of necessity." *Id.* at 501. Strict scrutiny is necessary to "smoke out" illegitimate uses of race to assure that the legislative body is pursuing a goal "important enough to warrant use of a highly suspect tool." *Id.* at 493; *Johnson*, 543 U.S. at 506. Labeling the Act an antidiscrimination measure does not avoid strict scrutiny.

In this case, petitioners vigorously dispute that the Act is an antidiscrimination measure. The Act invalidates at-large systems solely on the basis of race where no racial injury exists (*see infra* p.14-19) in order to achieve racial balance (*see infra* p. 21). It targets racially polarized voting in all at-large elections as "the problem" (App. 115a, 119a, 126a, 139a), and proceeds to address "the problem" by

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The statutes in *Loving* and *McLaughlin* treated interracial couples differently than all other couples because of their race. *See also Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 470, 474-75, 485, (1982) (racial educational issues treated differently than other educational issues), and *Hunter v. Erickson*, 393 U.S. 385, 392-393 (1969) (racial housing matters treated differently from all other housing matters). Similarly, the Act here facially treats racially polarized voting differently from all other voting, including all other polarized voting, *e.g.*, Republican v. Democrat. It facially treats racial preferences in voting differently from all other voting preferences, *i.e.*, political, religious, income, gender, etc.

invalidating 'all at-large systems, solely on the basis of racially polarized voting, without requiring proof of racial injury or racial discrimination.

This Court has held that racially polarized voting alone is not discrimination, declaring in *Thornburg* that, to be "legally significant," white bloc voting must "regularly defeat the choices of minority voters." *Thornburg*, 478 U.S. at 48. *See Valladolid v. City of National City*, 976 F.2d 1293, 1297 (9th Cir. 1992) (no violation because minority voters usually won). The Court also held that condemnation of racially polarized voting depends on proof that a racial group is sufficiently compact geographically to create a majority minority district in which it has the ability to elect candidates of its choice. *Thornburg*, 478 U.S. at 50. As this Court reasoned, ["u]nless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that practice," *id.* at 50 n.17, and *see Shaw*, 509 U.S. at 657; *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (without *Thornburg* showings, "there neither has been a wrong nor can be a remedy"). The Act, however, dispenses entirely with any requirement to prove that racially polarized voting actually causes racial injury. Plaintiffs need not prove a majority district or minority electoral defeat. Sections 14028(b) and (c). If "racially polarized voting occurs," regardless of whether it impairs the ability to elect or causes racial injury or discrimination, invalidation of at-large systems is mandated. Section 14028(a).

The legislative history, moreover, contains expressions of intent to achieve "more districts that would be truly representative of the protected classes of voters" (App. 147a) or governing boards "reflective of the communities they serve" (App. 137a, 150a, 152a); *see infra* p. 21. These pronouncements undermine the characterization of the Act as an "antidiscrimination" measure by the court below. *See*

Parents, 127 S. Ct. at 2752 (racial imbalance without more does not violate the Constitution). Strict scrutiny would reveal that the Act does not address discrimination but uses race to correct a perceived racial imbalance "problem" that is not a product of discrimination and causes no racial injury. Race-based legislation like the Act here must be closely scrutinized and constitutionally can be justified only by a compelling interest in remedying discrimination which the Act plainly does not require.

In any event, this Court never has held that a state statute is exempt from strict scrutiny because it is or is intended to be remedial. Quite to the contrary, this Court has held that all racial classifications, including those that are remedial, are subject to strict scrutiny. *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 493, 500; *Miller*, 515 U.S. at 904-05, 913-15, 922; *Parents*, 127 S. Ct. at 2752.

The Act operates entirely and only on racial classifications subject to strict scrutiny. Thus, the state appellate court's application of rational basis review to the Act is fundamentally at odds with this Court's jurisprudence and warrants plenary review and reversal. [3]

II. THE ACT IS FACIALLY UNCONSTITUTIONAL

In order for any racial classification to survive strict scrutiny, the State must demonstrate a compelling

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[3] The opinion erroneously suggests that strict scrutiny would imperil federal civil rights statutes. No support is offered for that assertion nor can we find any. This Court has made clear that all federal racial classifications are subject to strict scrutiny. *Adarand*, 515 U.S. at 227. Unlike the Act, federal civil rights laws require proof of racial injury before imposing liability, and thus actually do remedy discrimination, and satisfy strict scrutiny because they are narrowly tailored in scope and application.

governmental interest and establish that the classification is narrowly tailored to serve that interest and no others. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Croson*, 488 U.S. at 500; *Shaw*, 509 U.S. at 643-44; *Adarand*, 515 U.S. at 227. This showing requires findings of specific, identified discrimination, *Croson*, 488 U.S. at 510, and a "strong basis in evidence" of racial harm. *Miller*, 515 U.S. at 922.

This Court has held that remediation of discrimination serves a compelling governmental purpose and state statutes will be upheld if narrowly tailored in scope and application. *Parents*, 127 S. Ct. at 2752; *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Croson*, 488 U.S. at 500. Racial classifications, however, actually must be remedial to serve a compelling state interest. *Shaw v. Hunt*, 517 U.S. 899, 915-916 (1996). Gross overinclusion will impugn any claim of remedial purpose and operation. *Croson*, 488 U.S. at 506.

The Legislature here failed to make any findings or to provide any evidence that racially polarized voting alone causes racial harm to justify the Act's departures from federal voting rights law. No reviewing court, then, can conclude that the Legislature's interest is "compelling" or that the Act's scope is "narrowly tailored." The Act is facially unconstitutional.

A. The Act Invalidates At-Large Systems Solely On The Basis Of Racially Polarized Voting Where No Racial Injury Or Discrimination Exists

This Court's seminal VRA case, *Thornburg v. Gingles*, held that plaintiffs must prove the existence of three necessary preconditions. 478 U.S. at 50-51. Under *Thornburg*'s first precondition, plaintiffs must create a hypothetical, single member district in which a challenging minority group will constitute an "effective voting majority"

that is "able to elect" candidates of their choice. *Id.* at 38-39, 50. The rationale for this requirement is that unless plaintiffs are "able to elect" in a single member district, the at-large system "cannot be responsible for minority voters' inability to elect." *Id.* at 50, *see esp.* n.17 ("Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice") (second emphasis added).

Proof of a majority district remedy, then, is an essential element of liability. *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) at 1530 ("the first *Gingles* precondition, informed by the second, dictates that the issue of remedy is part of the plaintiffs' prima facie case") and 1533 ("[T]he absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under the totality of the circumstances inquiry, a finding of liability"); *Growe*, 507 U.S. at 40-41 ("Unless [the *Thornburg* preconditions] are established, there neither has been a wrong nor can be a remedy").

Numerous courts have dismissed voting rights cases where plaintiffs failed to prove a majority minority district under the first *Thornburg* precondition. *Romero v. City of Pomona*, 883 F.2d 1418, 1425-1427 (9th Cir. 1989); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947-48 (7th Cir. 1988); *Skorepa v. Chula Vista*, 723 F. Supp. 1384, 1390 (S.D. Cal. 1989). The fact that white bloc voting usually defeated minority-preferred candidates in those cases was insufficient to prove racial injury or vote dilution. There is no racial harm warranting remediation unless there is an "alternative system that would provide greater electoral opportunity to minority voters." *Holder v. Hall*, 512 U.S. 874, 887 (1994) (O'Connor, J., concurring). Put another

way, racially polarized voting alone is insufficient to prove racial injury.

The "majority district" requirement does not appear in the text of Section 2 or the Congressional legislative history for the VRA. It derives from the Court's pre-1982 vote dilution cases under the Fourteenth Amendment. *Whitcomb*, 403 U.S. at 156 (1971). It is constitutional in origin, designed to ensure the existence of a racial injury before imposing liability or relief on a racial basis to remedy discrimination.

The Act, however, eliminates *Thornburg*'s majority district requirement as an element of liability. Elections Code Section 14028(c) expressly provides that lack of geographic compactness "may not preclude a finding of ... a violation of Section 14027 and this section."

The legislative history makes clear that the Act specifically was designed to circumvent *Thornburg*'s first liability precondition. (App. 116a-117a, 128a) ("this bill would make it easier to challenge at-large districts"); (App. 116a, 120a, 127a, 145a) (only 2 of 3 *Thornburg* preconditions need be met); (App. 120a) ("This bill would avoid that problem"); (App. 135a) (bill would avoid bright-line test). The Act's legislative history reflects a superficial and mistaken understanding of vote dilution. (App. 120a-121a) (geographic compactness "would not appear to be important" in assessing dilution). The Legislature viewed the majority district requirement as merely a remedial issue that takes "the cart before the horse (the discrimination issue)," instead of an essential condition of liability. (App. 126a, 146a.)

The Act compels liability on the basis of racially polarized voting alone, even though this Court has held under

both the VRA and the Fourteenth Amendment that, in the absence of a winnable majority-minority district, minority voters suffer no racial injury, racial vote dilution or racial discrimination in voting caused by the at-large election system. *Thornburg*, 478 U.S. at 50-51, esp. n.17; *Whitcomb*, 403 U.S. at 156. By focusing on racially polarized voting as the "problem" (App. 115a, 119a, 126a, 135a, 139a), the Legislature assumed harm even in the absence of a majority district. (App. 145a) ("the central issue here is whether one's voting rights are being abridged or violated, not whether voters are geographically compact enough that they could elect their own representative"). Thus, Section 14028(a) of the Act states that a violation of 14027 is established "if it is shown that racially polarized voting occurs." Under the Act, racially polarized voting by itself is regarded as vote dilution in all cases in at-large systems (but not in district systems).

By eliminating any requirement to prove a majority district or minority electoral defeat, both necessary to prove an impairment of the "ability to elect," the Act intended to authorize suits challenging at-large elections for impairment of a minority group's "ability to influence" the outcome of an election. Elections Code Section 14027. This was the real purpose of the Act as seen in Senator Polanco's letter to the Governor, justifying the elimination of the majority district requirement so that minority plaintiffs can obtain a remedy when they cannot prove a majority district. (App. 135a.) The legislative history makes that explicit. (App. 120a.) ("This Bill Addresses Racially Polarized Voting If It Impairs The Right Of Protected Groups To Influence The Outcome Of An Election") (emphasis added).

This Court, however, has never regarded minimizing racially polarized voting as a significant state interest apart from compliance with the VRA (which requires proof of a majority district) or as a remedy for prior discrimination

under the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. at 657. In *Shaw v. Reno*, 509 U.S. at 657, and *Bush v. Vera*, 517 U.S. 952, 982 (1996), the Court held that race-based districting, as a response to racially polarized voting, is "constitutionally permissible" only when a majority district can be created. *See also Miller*, 515 U.S. at 921.

On five occasions since 1986, moreover, this Court declined to sanction "influence" claims that would invalidate at-large systems where a majority district cannot be proved.[4] The Court also summarily affirmed lower federal court decisions rejecting influence claims.[5] Were "ability to influence" claims to be approved, *Thornburg*'s "ability to elect," vote dilution standard would be rendered superfluous.

There is a sound reason for the Court's restraint. Without a majority district requirement, the Act mandates absurd results. Census data for Modesto indicate that there are more than 75 separate, identifiable racial and ethnic groups and subgroups, at least 74 ancestry groups and 19 languages other than English spoken in the home. (App. 81a-108a.) Each of these groups is a "protected group" that

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[4] *Thornburg*, 478 U.S. at 46, n.12; *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993); *Growe*, 507 U.S. at 41 n.5; *Holder*, 515 U.S. at 900, esp. n.8 (Thomas, J., concurrence); *Johnson v. DeGrandy*, 512 U.S. 997, 1008-09 (1994). The Court rejected an influence claim in *LULAC v. Perry*, 548 U.S. ___, 126 S.Ct. 2594, 2624-26 (2006).

[5] *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 378-79 (S. D. N. Y.) (three judge court), *aff'd summarily*, 5543 U.S. 997 (2004); *Turner v. Arkansas*, 784 F. Supp. 553, 567-70 (E. D. Ark. 1991) (three judge court), *aff'd summarily*, 504 U.S. 952 (1992); *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (three judge court), *aff'd summarily*, 540 U.S. 1013 (2003). *And see Cousin v. Sundquist*, 145 F. 3d 818, 828 (6th Cir. 1998) (holding that a claim of "an impairment of the minority's ability to influence the outcome of the election, rather than to determine it" was not cognizable under the VRA).

can sue under the Act in the absence of a majority district requirement. It is a certainty that one of these many groups will vote differently from at least one other group in every election. Without a majority district requirement, every at-large election system in California will fall.

If only one Hispanic were to reside in a city with 200,000 people and he or she votes for a candidate not favored by another group, a court must find liability under the Act, notwithstanding the obvious inability to create any remedy or a winnable district with only one Hispanic voter. As one case put it, "If 10% of the voters can 'swing' an election, perhaps so can 1% or 0.1%. A single voter is the logical limit." *Ill. Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 716 (N.D. Ill.) (three judge panel), *aff'd*, 506 U.S. 948 (1992) (emphasis added). If one group is large enough and concentrated enough to create a winnable district but other groups are too small to do so, the problem resolves itself under federal law. Under the Act, however, more than 100 distinct racial, ancestry and language groups in Modesto all have the same rights.

The Act, then, declares as discrimination what federal courts never have regarded as vote dilution, racial injury or racial discrimination, or as a significant state interest in remedying.

B. There Are No Findings To Justify Invalidation Of At-Large Systems Solely On The Basis Of Racially Polarized Voting Where No Racial Injury Or Discrimination Exists

States are not free to define discrimination any way they wish, or to declare circumstances to be discrimination that this Court has ruled do not constitute discrimination. The Fourteenth Amendment is an explicit constraint on state power, and states acting to remedy discrimination must do so

within the constraints of the Fourteenth Amendment. *Croson*, 488 U.S. at 490. This Court's definitions of racial discrimination in voting based on the Fourteenth and Fifteenth Amendments are binding on states.

Precisely because federal courts do not regard as discrimination what the Act here declares as illegal, the State must carry its burden under strict scrutiny to demonstrate that racially polarized voting alone, without proof of a majority district, causes racial harm or discrimination, remediation of which constitutes a compelling interest. There must be "a strong basis in evidence for its [the State's] conclusion that remedial action [is] necessary." *Croson*, 488 U.S. at 497, 500. The State must make findings that identify specific discrimination so that "the reasons for any [racial] classification be clearly identified and unquestionably legitimate." *Id.* at 510. Without findings, "there is simply no way of determining what classifications are 'benign' or 'remedial.'" *Id.* at 493.

The Legislature here failed to make any findings at all, much less the constitutionally required findings demonstrating a "strong basis in evidence" that racially polarized voting by itself causes racial harm in the absence of a majority district or minority electoral defeat. There are no findings or evidence presented of how racially polarized voting alone amounts to harm or injury or discrimination. There is no analysis demonstrating that districts that are not majority minority will result in minority electoral success.

Dissident legislators questioned what benefit would result from eliminating *Thornburg*'s majority district requirement. (App. 112a, 117a, 128a, 131a.) One legislator asked, "if a minority community is not sufficiently geographically compact to ensure that it can elect one of their members from a district, what is gained by eliminating the at-

large election system?" (App. 112a.) Another legislator asked, "How will single member districts change the results?" (App. 131a.). The Legislature never provides an answer to these questions.

The legislative history, however, is replete with conclusory statements about the importance of elected bodies reflecting the racial and ethnic composition of their constituents. (App. 137a, 150a, 152a, 154a.) (CVRA "will help ensure that California's electoral system is fair, open to, and representative of all California voters"); (App. 137a, 150a, 152a) ("it is important that governing boards of local jurisdictions reflect the communities they serve"), (App. 140a, 147a) ("California is now a state of minorities and it is only fitting that our law reflect this") and (App. 147a) (CVRA may lead to "more districts that would be truly representative of the protected classes of voters"). However desirable these goals are, an interest in achieving racial balance cannot justify judicial intervention in the absence of intentional discrimination or racial injury. Racial imbalance without more does not violate the Constitution. *Parents*, 127 S. Ct. at 2752. Racial balancing for its own sake is per se unconstitutional. *Grutter*, 539 U.S. at 330.

Both the Act and the opinion below (App. 7a-8a) mistakenly treat remedy as an issue to be addressed only after imposing liability. This Court's precedents, however, unequivocally hold that States may enact race-based legislation to remedy discrimination only on proof of intentional discrimination or where there is a "strong basis in evidence of racial harm." *Croson*, 488 U.S. at 497, 500 (constitutional violations); *Miller*, 515 U.S. at 922 ("When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather we insist on a strong basis in evidence of the harm being remedied"). The decision below

upholds the Act because it enlarges "the potential for relief" (App. 10a), but this Court's cases hold that the scope of a remedy is determined by the extent of a violation. *Milliken v. Bradley*, 418 U.S. 717, 744, 749 (1974); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986); and *Shaw*, 509 U.S. at 642-47; *Bush*, 517 U.S. at 976-81 and *Miller*, 515 U.S. at 920-22, holding that race-based districting is permissible only for constitutional or VRA violations. Thus, without proof of a majority district at the liability stage to demonstrate racial injury, there can be no wrong that would justify the race-based remedy of voiding an at-large system solely on the basis of race. *See Milliken*, 418 U.S. at 745.

Under the Act, once racially polarized voting is proven, the at-large system is declared illegal without more. (App. 146a.) Remedies are considered and imposed after a "violation" is established. The Act explicitly states that lack of majority district "may not preclude ... a violation of Section 14027 ... but may be a factor in determining an appropriate remedy." Section 14028(c). The ability to consider a majority district or any other alternative at the remedy stage, however, is too little, too late, constitutionally. The decision below also mentions the availability of remedies other than districts, including remedies that are not race-based, but this observation ignores the fact that invalidation of at-large systems, solely on the basis of race, is a race-based remedy that is impermissible without proof of racial discrimination that the Act does not require. Proof of these remedies is in any event not required as an element of liability before the at-large system is invalidated. There is not even any requirement to prove that the challenging minority group will do better under the alternative election method imposed at the remedy stage. The Act shoots first, declares the at-large system invalid and then replaces it with an alternative system without any requirement to prove that

plaintiffs will do better under the replacement election method.

C. The Act Is Facially Unconstitutional

Racial classifications are "simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz*, 539 U.S. at 270. In this instance, the Legislature failed to provide any justification for the invalidation of at-large systems, solely on the basis of race, as a remedy for discrimination, much less any nexus between justification and classification. Because of the lack of any findings, no court can conclude that the Act's racial classifications serve the compelling state interest of remedying discrimination, or that the scope of the Act is narrowly tailored to be strictly remedial. As no interest other than remediation of discrimination has been advanced, the Act is facially unconstitutional.

Nor is there merit to the suggestion below that, under *United States v. Salerno*, 481 U.S. 739, 745 (1987), the statute can be saved facially by narrower judicial application to only that racially polarized voting shown to cause racial injury. Neither *Salerno* nor any other decision of this Court provides an escape from the presumption of facial unconstitutionality requiring government to justify a racial classification where there is no nexus between justification and classification. *See, e.g., Parents,* 127 S. Ct. at 2794 (Kennedy J., concurring) ("*Gratz* involved a system where race was not the entire classification"). To suggest that a narrower application of the statute as reaching only racially polarized voting shown to be discriminatory or racially injurious can be scripted by the courts to save it facially from presumed unconstitutionality, is to ignore both the CVRA's very purpose (*i.e.*, to ban all at-large elections solely on the basis of racially polarized voting by eliminating *Thornburg*'s

first precondition) and its overarching infirmity (*i.e.*, no nexus between justification and classification).

CONCLUSION

The petition should be granted. The Court may wish to consider summarily vacating the decision below and remanding for reconsideration in light of *Parents*.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the Court of Appeal of the State of California, Fifth Appellate District

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Filed December 6, 2006 - Certified for Publication

ENRIQUE SANCHEZ, ET AL.,
Plaintiffs and Appellants,

v.

CITY OF MODESTO, ET AL.,
Defendants and Respondents.

OPINION
(No. F048277)
(Super. Ct. No. 347903)

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Heller Ehrman, George H. Brown, Warrington S. Parker, III, Peter E. Gratzinger, Nicholas S. Campins, Stephen A. Tuggy, and Ronald A. Valenzuela; Lawyers' Committee for Civil Rights, Robert Rubin and Nicholas Espiritu; Seattle University School of Law, Joaquin G. Avila, for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Louis R. Mauro, Assistant Attorney General, Christopher E. Krueger and Douglas J. Woods, Deputy Attorneys General, for State of California as Amici Curiae on behalf of Plaintiffs and Appellants.

Kathay Feng for California Common Cause and FairVote as Amici Curiae on behalf of Plaintiffs and Appellants.

Alan Smith, City Attorney; Hogan and Hartson, John W. Borkowski, Joseph G. Krauss, Nichelle Billips, Chhaya Malik, and Monica Sahaf, for City of Watsonville as Amici Curiae on behalf of Plaintiffs and Appellants.

Howrey, John E. McDermott; Richard Rudnansky, Interim City Attorney (Modesto), Roland R. Stevens, Assistant City Attorney, for Defendants and Respondents.

Gilbert Trujillo, City Attorney, for City of Santa Maria as Amici Curiae on behalf of Defendants and Respondents.

Patrick Whitnell for League of California Cities as Amici Curiae on behalf of Defendants and Respondents.

The trial court granted the defense's motion for judgment on the pleadings after ruling that the California Voting Rights Act of 2001 was facially invalid under the equal protection clauses of the state and federal Constitutions. It entered judgment against plaintiff Latino voters, who allege that, because of racially polarized voting in Modesto, they are precluded from electing any candidates in the city's at-large city council elections. No evidence has been presented in support of or in opposition to this claim. Rather, at a preliminary stage of the litigation, the trial court struck down the CVRA, ruling that any possible application would necessarily involve unconstitutional racial discrimination. As we will explain, Modesto's arguments do not support disposing of the Legislature's act in this summary manner.

Courts make two kinds of decisions about the constitutionality of laws: decisions about whether a law is

invalid on its face and in all of its conceivable applications (called "facial" invalidity), and about whether a particular application of a law is invalid (called "as-applied" invalidity). In this case, the City of Modesto attempted to show that the CVRA is unconstitutional because it is facially invalid. Modesto's arguments cannot establish facial invalidity. The city may, however, use similar arguments to attempt to show *as-applied* invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here. In doing so, at that time they can ask the court to decide whether the particular application or remedy is discriminatory.

Why do Modesto's arguments fail to show that the CVRA is facially unconstitutional? Modesto takes the position that the CVRA is unconstitutional because it uses "race" to identify the polarized voting that causes vote dilution and prevents groups from electing candidates. Modesto claims that this use of race constitutes reverse racial discrimination and is a form of unconstitutional affirmative action benefiting only certain racial groups. However, this is not an accurate characterization of what the CVRA requires. The CVRA is race-neutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system—like the election system used in Modesto. In this respect, it is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California's Fair Employment and Housing Act.

The reality in California is that no racial group forms a majority.[1] As a result, *any* racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White cities. Both demographic situations exist in California, even within our own San Joaquin Valley, and the CVRA applies to each in exactly the same way.

The trial court also found facially unconstitutional the portion of the CVRA that allows attorney fees to be awarded to prevailing plaintiffs. The trial court reached this issue even though it was moot—plaintiffs never had an opportunity to seek attorney fees, since they lost—and the city only briefed the issue after the trial court asked it to do so. Further, in reaching its decision, the court focused on an improbable set of hypothetical facts. The asserted invalidity of a single hypothetical application is not a proper basis for finding the fee clause invalid on its face.

The judgment is reversed and the case is remanded to the trial court.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiffs are Latino voters who reside in Modesto. They filed a complaint in Superior Court on June 3, 2004, alleging that, because of racially polarized voting, the city's at-large method of electing city council members diluted their votes. The complaint named as defendants the City of Modesto, the city clerk, the mayor, and each member of the city council.

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[1] We take judicial notice of this fact, which was revealed by the 2000 census. (See <http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF1_U_DP1&-geo_id=04000US06&-ds_name=DEC_2000_SF1_U&-_lang=en&-_sse=on> [census table reporting non-Hispanic Whites as 46.7 percent of state population].)

According to the complaint, in Modesto's at-large election system, candidates for city council run for individual seats to which numbers are arbitrarily assigned and for each of which all the city's voters may vote. To win, a candidate must receive a majority of the votes cast for the seat for which he or she has chosen to run. A runoff between the top two vote-getters for a seat occurs if no candidate receives a majority. The complaint alleges that this system, combined with a pattern of racially polarized voting, regularly prevented Latino voters from electing any candidates of their choice or influencing city government. Although Latinos were 25.6 percent of the city's population of 200,000, only one Latino had been elected to the city council since 1911.

The complaint alleged one cause of action, a violation of the CVRA (Elec. Code, §§ 14025-14032),[2] and prayed for the imposition of a district-based system as a remedy. The CVRA provides a private right of action to members of a protected class where, because of "dilution or the abridgement of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election ...." (§§ 14027, 14032.) To prove a violation, plaintiffs must show racially polarized voting. They do not need to show that members of a protected class live in a geographically compact area or demonstrate an intent to discriminate on the part of voters or officials. (§ 14028.)

Some background on federal voting rights law is helpful to provide context for the CVRA. Like the CVRA, section 2 of the Federal Voting Rights Act (FVRA) (42 U.S.C. § 1973) creates liability for vote dilution. A violation of the FVRA is established if "the political processes leading to nomination or election in [a] State or political subdivision [of a state] are not equally open to participation by members of a [protected] class ... in that its members have less

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[2] Subsequent statutory references are to the Elections Code unless otherwise noted.

opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (42 U.S.C. § 1973(b).) Amendments to the FVRA passed by Congress in 1982 made it clear that intentional discrimination by officials is not required to show a violation. (*Shaw v. Reno* (1993) 509 U.S. 630, 641 (*Shaw*); *Thornburg v. Gingles* (1986) 478 U.S. 30, 35 (*Gingles*).) Later, after noting that it has "long recognized" that at-large elections and multi-member districts can """minimize or cancel out the voting strength""" of minorities (*Gingles, supra,* at p. 47), the Supreme Court delineated the elements of a vote-dilution violation under the FVRA:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." (*Gingles, supra*, 478 U.S. at pp. 50-51 (fn. omitted).)

Section 2 of the FVRA does not allow states to use race however they want to in remedying vote dilution. In fact, the Supreme Court has recognized constitutional limitations on race-based districting plans adopted by state and local governments attempting to avoid section 2 liability. For example, in *Shaw, supra,* 509 U.S. 630, the court considered a new district map for the State of North Carolina, created by the state legislature after the results of the 1990 census gave the state a right to an additional member of the House of Representatives. The new districting plan included two majority-Black districts. The plaintiffs claimed the plan constituted an unconstitutional racial gerrymander. (*Id.* at pp. 633-634, 641.) Among the justifications the state offered for the plan was that the two majority-Black districts were

needed to avoid liability for vote dilution under section 2 of the FVRA. (*Shaw, supra,* at p. 655.) Reversing the trial court's order dismissing the case, the Supreme Court held that the plaintiffs had stated a valid claim for relief under the equal protection clause of the Fourteenth Amendment. (*Shaw, supra,* at pp. 637-639, 642.) It stated that, because the majority-Black districts' shapes were so bizarre, they could not "rationally … be understood as anything other than an effort to separate voters into different districts on the basis of race," and the redistricting plan should be subjected by the trial court to strict scrutiny, just like "other state laws that classify citizens by race." (*Id.* at pp. 644, 649.)

Later cases explained that a finding that race was the "predominant" factor in creating a district—to which other factors were "subordinated"—is what triggers strict scrutiny. (*Bush v. Vera* (1996) 517 U.S. 952, 958-959 (plur. opn. of O'Connor, J.) (*Vera*).) *Shaw* and its progeny therefore stand for the following proposition: While state and local governments are commanded not to permit racial vote dilution that violates section 2 of the FVRA, they are also forbidden to use race as the predominant factor in a redistricting scheme designed to avoid a violation unless that use of race passes strict scrutiny. The court has assumed without deciding that race-conscious measures undertaken to avoid section 2 liability pass strict scrutiny if those measures use race no more than is reasonably necessary to achieve section 2 compliance. (*Vera, supra,* 517 U.S. at pp. 976-979.)

The legislative history of the CVRA indicates that the California Legislature wanted to provide a broader cause of action for vote dilution than was provided for by federal law. Specifically, the Legislature wanted to eliminate the *Gingles* requirement that, to establish *liability* for dilution under section 2 of the FVRA, plaintiffs must show that a compact majority-minority district is possible. That said, the bill that ultimately became the CVRA did intend to allow geographical compactness to be a consideration at the *remedy*

stage. A bill analysis prepared by staff for the Assembly Committee on Judiciary reflects this fact:

> "This bill would allow a showing of dilution or abridgement of minority voting rights by showing the first two *Thornburg* [*v. Gingles, supra*, 478 U.S. 30] requirements without an additional showing of geographical compactness.... This bill recognizes that geographical concentration is an appropriate question at the *remedy* stage. However, geographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system. Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown)." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 (italics added).)

Another point emphasized in the legislative history is California's lack of a racial majority group. The Assembly Judiciary Committee analysis says "[t]he author states that [the bill] 'addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity.... In California, we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction...." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.)

The bill ultimately became sections 14025 to 14032 of the Elections Code. Here is a synopsis of those provisions:

- Section 14027 sets forth the prohibited government conduct:

> "An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters who are members of a protected class, as defined pursuant to Section 14026."

- A protected class is a class of voters "who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)

- Section 14032 gives a right of action to voters in protected classes.

- Section 14028 lists facts relevant to proving a violation: The dilution or abridgement described in section 14027 is established by showing racially polarized voting. (§ 14028, subd. (a).) Circumstances to be considered in determining whether there is racially polarized voting are described. (§ 14028, subd. (b).) Lack of geographical concentration of protected class members and lack of discriminatory intent by the government are not factors in determining liability. (§ 14028, subds. (c), (d).) Certain other probative factors are included. (§ 14028, subd. (e).)

- The court shall "implement appropriate remedies, including the imposition of district-

based elections," if it finds liability. (§ 14029.)

- Prevailing plaintiffs shall be awarded attorney fees. Prevailing defendants can recover only costs, and then only if the action was frivolous. (§ 14030.)

According to plaintiffs, the CVRA enlarges the potential for relief beyond that available under the FVRA in a number of ways, of which the elimination of the geographically compact majority-minority district requirement as an element of liability is only the beginning. First, freed of that requirement, a court could craft a remedy involving a crossover or coalition district. A crossover district is one in which, although members of the plaintiffs' group do not constitute a majority, that group can elect candidates of its choice by joining forces with dissident members of the racial majority who also live in the district. A coalition district is similar, except that members of the plaintiffs' group join forces with members of another racial minority group.

Second, a court could impose a remedy not involving districts at all, relying instead on one of several alternative at-large voting systems. In one of these, called cumulative voting, each voter has as many votes as there are open seats and may distribute them among several candidates or give them all to one candidate. In a cumulative voting system, a politically cohesive but geographically dispersed minority group can elect a single candidate by giving all its votes to that candidate, although it would be unable to elect any candidates in a conventional winner-take-all at-large system and could not form a majority in any feasible district in a district system.

Defendants in this case filed a motion for judgment on the pleadings, arguing that the CVRA was facially invalid under the equal protection clause of the Fourteenth

Amendment and article I, section 7 (i.e., the equal protection provision) of the California Constitution. In response to a request by the trial court, defendants filed a supplemental brief arguing that the CVRA's attorney-fee provision also violated article XVI, section 6, of the California Constitution, which prohibits gifts of public funds. The trial court agreed with defendants on both points. It granted the motion and entered a judgment of dismissal.

DISCUSSION

The standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer: We treat as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determine de novo whether the complaint states a cause of action under any legal theory. (*DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972.) We may rely on any applicable legal theory in affirming or reversing because we "'review the trial court's disposition of the matter, not its reasons for the disposition.'" (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1065.)

Where reasonably possible, we are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 60; *Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 254.) Even judicial reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.) Principles of judicial self-restraint similarly require us to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10.)

I. CITY'S STANDING TO CHALLENGE STATUTE

As a threshold issue, plaintiffs contend that defendants are not entitled to bring their constitutional challenge to the CVRA. We disagree. Plaintiffs rely on a settled line of cases barring cities from mounting equal protection challenges to state statutes, but a second line of cases establishes an exception, into which this case falls. In light of our conclusion that defendants' equal protection challenge fails on its merits, we could decide this appeal without reaching the standing issue. We choose to address it, however, because the equal protection issue will likely arise on remand if the case reaches the remedy stage, and the standing question will surface again.

Defendants moved to strike the footnote in plaintiffs' reply brief in which standing was first raised and argued that we should not address it. We disagree because standing can be raised at any time. (*Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 745; *Marshall v. Pasadena* Unified *School Dist.* (2004) 119 Cal.App.4th 1241, 1251; *People v. Leung* (1992) 5 Cal.App.4th 482, 490, fn. 2.) The issue of standing here does not come up in the traditional context, as we shall explain; however, it is sufficiently similar to warrant application of the rule that it may be raised at any time.

Further, defendants have had two opportunities to brief the issue. They did so first in their motion to strike the footnote, where they requested leave to submit additional briefing, and included a supplemental brief as a section of their motion. This request is granted and the supplemental discussion in the motion is deemed filed. Defendants also submitted a supplemental brief on the issue in response to our briefing letter dated June 30, 2006. For these reasons, defendants cannot legitimately claim to be prejudiced by any lack of opportunity to inform the court of their position. We

hold that addressing the issue is appropriate and deny the motion to strike.[3] We now turn to the merits.

Plaintiffs invoke the "well-established rule that subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution." (*Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6 (*Star-Kist*).) The concept of standing at issue here is not the usual one limiting the rights of plaintiffs, but a special one pertaining to cities and counties attempting, as plaintiffs or defendants, to challenge state laws:

> "The term 'standing' in this context refers not to traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute, but to a narrower, more specific inquiry focused upon the internal political organization of the state: whether counties and municipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce." (*Star-Kist, supra*, 42 Cal.3d at pp. 5-6, fn. omitted.)

The rule against city and county standing in cases of this kind derives from the United States Supreme Court's holdings in *Williams v. Mayor* (1933) 289 U.S. 36, 40 (*Williams*) and a number of earlier cases. In *Williams*, the Maryland Legislature exempted a railroad from local taxes. (*Id.* at pp. 37-38.) The railroad was in the hands of a receiver appointed by a federal district court. Two cities filed claims in the receivership proceedings in the district court seeking

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[3] In addition to the motion to strike and request for leave to submit supplemental briefing, a number of requests for judicial notice are pending. These requests, which we list in the Disposition, are granted.

taxes due. They challenged the tax-exemption statute under the equal protection clause of the Fourteenth Amendment. (*Williams, supra,* 289 U.S. at pp. 39-40.) The Supreme Court reversed a lower court decision invalidating the statute. Its explanation of this holding is simply: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (*Id.* at p. 40.) The court cited several of its own earlier cases, none of which explained the rule in any greater detail. (See, e.g., *Newark v. New Jersey* (1923) 262 U.S. 192, 196 [city not entitled to raise 14th Amend. equal protection challenge to state's imposition of water use fee]; *Trenton v. New Jersey* (1923) 262 U.S. 182, 185-188, 192 [city not entitled to challenge same fee under due process clause of 14th Amend. or under contract clause of art. I, § 10, of the U.S. Const.].)

California courts have applied the rule in a variety of contexts. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209 [city cannot rely on contract clause to obtain invalidation of a state statute allegedly impairing a preexisting contract between city and state]; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 380 [airport authority, as political subdivision of state, had no standing to challenge under due process clause of 14th Amend. a state statute allowing a city to review authority's development plans]; *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296-297 (*McMahon*) [county had no power to challenge under due process clause of 14th Amend. a state law requiring it to contribute county funds for welfare payments]; *City of Los Angeles v. City of Artesia* (1977) 73 Cal.App.3d 450, 457 [City and County of Los Angeles could not seek invalidation under due process clause of 14th Amend. or contract clause of retroactive application of state law limiting amount counties could charge Lakewood Plan cities for police protection].) The Ninth Circuit in California has applied the rule as well. (*City of South Lake Tahoe v. California Tahoe*

(9th Cir. 1980) 625 F.2d 231, 233-234 [city lacked standing to challenge under 14th Amend. a planning agency's land use rules promulgated pursuant to state statute].)

The California Supreme Court has held that the no-standing rule does not apply to a political subdivision's claim that a state statute encroaches on the power of Congress to regulate interstate commerce under the commerce clause of the United States Constitution. (*Star-Kist, supra*, 42 Cal.3d at pp. 4, 8-9.) It relied in part on federal cases holding that the no-standing rule also does not apply to challenges based on the supremacy clause of the United States Constitution. (*Id.* at p. 8.) The court did not, however, disturb the doctrine with respect to the equal protection and due process clauses of the Fourteenth Amendment and the contract clause, the areas in which it traditionally has been applied. (*Id.* at pp. 5-6.)

A second line of cases establishes an exception to the no-standing rule for situations in which the claim of a city or county is best understood as a practical means of asserting the individual rights of its citizens. The first of these cases, *Drum v. Fresno County Dept. of Public Works* (1983) 144 Cal.App.3d 777 (*Drum*), involved a county's due-process challenge to its own inadequate notice to a building project's neighbors of a zoning-variance hearing. The county approved a request for a variance to enable a homeowner to build a garage. The notices of the variance hearing received by the neighbors described the garage. Later, the owner decided to add a second story with living quarters to the garage and requested a permit for the new design. The county issued the permit. When construction began, neighbors complained that they had not been informed about the second story. The county reversed its decision to issue the permit and issued a stop-work order. In the ensuing litigation between the owner and county, the county argued that the permit it issued for a two-story garage was invalid because it was not within the scope of the variance of which the neighbors had received notice; the neighbors' due process

rights had therefore been violated. (*Id.* at pp. 779-781, 782.) We agreed with this position, rejecting the owner's argument that the county was not entitled to assert individual citizens' due process rights:

> "It would serve no legitimate interest to hold that appellant may not invoke lack of notice to its citizens in order to enjoin construction of respondents' building. Surely it should be able to invoke its own requirements of notice in order to preserve the public interest in preserving community patterns established by zoning laws." (*Drum, supra*, 144 Cal.App.3d at pp. 784-785.)

Admittedly, *Drum* did not involve a local government's challenge to a state law and dealt with statutory rather than constitutional due process rights. (*Drum, supra*, 144 Cal.App.3d at p. 783.) It did not discuss or cite any of the no-standing cases we mention above. But the next case in the line, *Selinger v. City Council* (1989) 216 Cal.App.3d 259 (*Selinger*), relied on *Drum*, among other authorities, in expressly asserting an exception to the no-standing rule.

In *Selinger*, a subdivision developer obtained a writ of mandate from the superior court requiring a city to acknowledge that his subdivision map was deemed approved by operation of law—because one year had elapsed without city action on his application—under the Permit Streamlining Act, a state statute. (*Selinger, supra*, 216 Cal.App.3d at p. 263.) Among other things, the city argued that the Permit Streamlining Act violated adjacent landowners' right to due process of law by allowing a development plan to be automatically approved without notice and a hearing. (*Id.* at p. 270.) The Court of Appeal agreed, rejecting the developer's argument that the city lacked standing to contest the validity of the statute. The court noted the no-standing rule as stated in *Star-Kist, supra*, 42 Cal.3d at page 6, but it

cited *Drum, supra*, 144 Cal.App.3d 777 in support of making an exception. (*Selinger, supra*, 216 Cal.App.3d at pp. 270, 271.)

More powerfully, the court relied on the Supreme Court's doctrine of third-party standing as set forth in *Singleton v. Wulff* (1976) 428 U.S. 106. In that case, the Supreme Court explained that constitutional rights usually must be asserted by the person to whom they belong, but that a litigant may assert them on behalf of a third party under exceptional circumstances. (*Id.* at p. 114.) In addition to the requirement that the litigant must sustain an injury of its own, two factual elements are relevant in determining whether the litigant should be allowed to assert a third party's rights. One tests whether the litigant and third party are related closely enough to ensure that the litigant's interest in asserting the right is genuine and its advocacy will be effective:

> "The first [element] is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." (*Singleton v. Wulff, supra*, 428 U.S. at pp. 114-115.)

The second element concerns the reasons why the third party is not asserting or cannot assert the right in question for itself:

> "The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." (*Singleton v. Wulff, supra*, 428 U.S. at pp. 115-116.)

In *Selinger*, the Court of Appeal thought the two elements supported the city's standing. Local citizens' right to notice and a hearing was "inextricably bound up" with the city's interest in reviewing and conditioning subdivision applications on its own timetable based on local needs. (*Selinger, supra*, 216 Cal.App.3d at p. 271.) Also, there was a high obstacle to local citizens' ability to litigate their rights: Without notice, adjacent landowners would be likely to miss the 90-day statutory deadline for legal challenges to the approval of subdivision maps. (*Ibid.*)

The Court of Appeal applied the exception to the no-standing rule again in *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621 (*Central Delta Water*). Two local water agencies sued the State Water Resources Control Board, mounting an equal-protection challenge to discharge fees imposed on them under a state statute and regulations. (*Id.* at pp. 627-629, 630.) The Court of Appeal rejected the defendant's claim that, as political subdivisions, the agencies lacked standing to challenge the statute and regulations. It stated that the equal protection rights of the agencies' constituent water users were inextricably bound up with the agencies' duty to supply water. (*Id.* at pp. 630-631.) The court did not explain what

obstacles prevented the constituents from suing on their own behalf.

We believe these courts have reasoned correctly in establishing an exception to the no-standing rule for those situations in which the usual standards for third-party standing are satisfied. As previously mentioned, we acknowledge that there was no challenge to a state statute in *Drum*, and therefore the principle that a political subdivision cannot challenge the will of its creator was not implicated. Consequently, the citation of *Drum* by the *Selinger* court was a stretch. But the reasoning stated in *Selinger* and applied in *Central Delta Water* is sound. Although a local government has no equal protection rights of its own to assert against the state, there is no reason why it cannot act as a mouthpiece for its citizens, who unquestionably have those rights, where the third-party-standing doctrine would allow it.

We recognize that the third-party-standing doctrine is the key to the exception; that the doctrine is addressed to the standing of plaintiffs to sue in federal court; and that we deal here neither with the standing of plaintiffs nor with federal court. The doctrine is a sound basis for the exception in spite of these omissions. The point of the no-standing rule is to prevent local governments, whether as plaintiffs or defendants, from using certain provisions of the federal Constitution to obtain invalidation of laws passed by their creator, the state. This notion has no application where the truly interested parties—citizens or constituents of the local government entity—undisputedly do have standing and the entity merely asserts rights on their behalf.

This case falls into the exception to the no-standing rule established in these cases. As the Supreme Court explained in *Shaw*, *supra*, 509 U.S. 630, the constitutional interest at stake in an equal-protection challenge to race-related changes in a voting system arises from the fact that changes of that kind may "reinforce ... racial stereotypes and threaten ... to undermine our system of representative

democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." (*Id.* at p. 650.) Individual voters are entitled to assert this interest through litigation testing state laws, as they did in *Shaw*. The city's assertion of equal protection rights in this case is best understood as a means of asserting those rights on behalf of its citizens.

The requirements of third-party standing are satisfied here. First, the relationship between the city and individual citizens or voters is of the appropriate kind. The city's vigorous litigation up to this point has shown its zealousness in asserting the claimed right. Plaintiffs' complaint has informed us that city voters rejected district-based elections by a large margin in a referendum in 2001, so the city likely is acting with substantial constituent support for its position. A cross-complaint filed by the individual defendants, seeking a judgment declaring the CVRA unconstitutional, shows that at least those individuals want to have the city pursue the matter on their behalf. Finally, the claimed equal-protection interest of individual citizens is "inextricably bound up" (*Singleton v. Wulff, supra*, 428 U.S. at p. 114) with the city's interest in continuing its present election system.

Second, there are genuine obstacles to citizens asserting their own rights. It is not clear how a lawsuit could be structured to enable citizens to mount the facial challenge made by the city. Prior to any change in the city's voting system, whom would these citizens sue, and for what? Making citizens wait until after some remedy is ordered or adopted would involve other obstacles, including the possibility that elections could be held under the remedy before the litigation is concluded. Even after adoption of a change in the system, an individual voter's stake in the matter would be small in relation to the economic burdens of litigation, and this could be a substantial deterrent. (See *Powers v. Ohio* (1991) 499 U.S. 400, 415 [venire person dismissed in criminal case for racially discriminatory reason has little incentive to pursue costly litigation to vindicate his

or her equal protection rights, so criminal defendant must be permitted to assert those rights].) While these obstacles would not make it impossible for individual voters to sue the city if some alteration in its voting system is adopted, a showing of impossibility is not required. (See *Singleton v. Wulff, supra,* 428 U.S. at p. 116, fn. 6 [dis. opn. argued that third parties must face insuperable obstacles; maj. replied that "our cases do not go that far"].)

For these reasons, we reject plaintiffs' contention that defendants are not entitled to assert an equal protection challenge to the CVRA. The city is entitled to do so on behalf of its citizens.

II. EQUAL PROTECTION

A. Principles

We begin our examination of defendants' equal-protection claim with a brief review of the basic constitutional principles at issue. Federal and California equal-protection standards are not the same for all purposes. (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 652-653 (dis. opn. of Kennard, J.); *Butt v. State of California* (1992) 4 Cal.4th 668, 683, 685.) Here, however, the parties' briefs rely on federal case law and do not claim that any different standards apply to these facts under the state Constitution. We will, therefore, focus on principles developed in federal cases.

1. Suspect classifications, fundamental rights, strict scrutiny, and rational-basis review

A state's use of a classification is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment if it is a suspect classification or if it burdens a fundamental right. (*Plyler v. Doe* (1982) 457 U.S. 202, 216-218 & fns. 14 & 15.) Otherwise, the classification is subject only to rational-basis review. (*Vacco v. Quill* (1997) 521

U.S. 793, 799.) Race is a suspect classification (*Johnson v. California* (2005) 543 U.S. 499, 505 (*Johnson*)), and the right to vote is a fundamental right (*Kramer v. Union School District* (1969) 395 U.S. 621, 626-628) for equal protection purposes.

A law subject to strict scrutiny is upheld only if it is *narrowly tailored* to promote a *compelling* governmental interest. (*Johnson, supra*, 543 U.S. at p. 505.) Under rational-basis review, by contrast, a law need only bear a *rational relationship* to a *legitimate* governmental interest. (*Vacco v. Quill, supra*, 521 U.S. at p. 799.) (The third level of review—intermediate scrutiny, which applies to sex discrimination—is not at issue in this case.)

2. Facial invalidity standard

Defendants' challenge claims that the statute is facially invalid. In *United States v. Salerno* (1987) 481 U.S. 739, 745 (*Salerno*), the Supreme Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." The court explained that the fact the federal Bail Reform Act, subject in that case to a substantive due-process challenge, "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (*Ibid.*)

Defendants assert that the *Salerno* standard does not apply here because *Salerno* was not cited in certain cases involving affirmative action laws (see, e.g., *Richmond v. J. A. Croson Co.* (1989) 488 U.S. 469 [municipal ordinance establishing affirmative action program for city contracting]); laws creating specific election districts (see, e.g., *Shaw, supra*, 509 U.S. 630 [bizarrely shaped congressional district boundaries designed to create majority-Black districts]); and laws involving explicit use of racial segregation (see, e.g.,

Johnson, supra, 543 U.S. 499 [racial segregation of prisoners during initial evaluation]). Various justices of the Supreme Court, not amounting in any instance to a majority, have taken differing positions on the scope and applicability of the *Salerno* doctrine. (*Chicago v. Morales* (1999) 527 U.S. 41, 55, fn. 22 (conc. opn. of Stevens, J., joined by Souter, J. and Ginsburg, J.) [*Salerno* formulation is dictum and need not be followed, especially by state courts]; *id.* at pp. 77-80 & fns. 1-3 (dis. opn. of Scalia, J.) [*Salerno* states the correct standard for all cases but First Amendment overbreadth challenges].)

The only cases of which we are aware where it has been definitively stated that a facial challenge could succeed on a showing falling short of the *Salerno* standard, however, are those where the overbreadth of a law violated the First Amendment by chilling protected speech (*Salerno, supra,* 481 U.S. at p. 745) and where a law imposed an undue burden on the right to have an abortion (*Planned Parenthood of Southern Arizona v. Lawall* (9th Cir. 1999) 180 F.3d 1022, 1026 [asserting that in *Planned Parenthood of Southern PA v. Casey* (1992) 505 U.S. 833, U.S. Supreme Court overruled *Salerno* in context of facial challenges to abortion restrictions]). Outside these areas, California courts apply a *Salerno*-type approach to facial constitutional challenges in general. (See, e.g., *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 709; *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) We agree there is no warrant for refusing to apply *Salerno* outside the First Amendment overbreadth and abortion areas until a majority of the Supreme Court gives clear direction to do so. (*Hotel & Motel Ass'n of Oakland v. City of Oakland* (9th Cir. 2003) 344 F.3d 959, 972.) Consequently, we hold that the *Salerno* standard for facial invalidation applies here, and defendants can succeed in their facial challenge only by showing that the CVRA can be validly applied under no circumstances.

B. Analysis

With this background, the two basic reasons for rejecting defendants' challenge to the CVRA are easy to state. First, because the statute is nondiscriminatory, it is subject only to rational-basis review, not strict scrutiny; and it passes rational-basis review. Second, although the *Shaw-Vera* line of cases reveals the potential for unconstitutional applications of the statute, that potential does not show there can be no valid applications and therefore cannot establish that the statute is facially invalid. We consider these two reasons in turn.

1. The CVRA is nondiscriminatory, not subject to strict scrutiny, and passes rational basis review

Like the FVRA, the CVRA involves race and voting, but, also like the FVRA, it does not allocate benefits or burdens on the basis of race or any other suspect classification and does not burden anyone's right to vote. Like the FVRA, the CVRA confers on voters of any race a right to sue for an appropriate alteration in voting conditions when racial vote dilution exists.

The CVRA vote-dilution cause of action differs from the FVRA version in important ways, specifically, that the need to prove the possibility of creating a geographically compact majority-minority district is eliminated. The differences do not introduce a racial classification or a burden on the right to vote, however. Therefore, the facial terms of the statute are not subject to strict scrutiny. Only rational-basis review applies, and the CVRA readily passes it. Curing vote dilution is a legitimate government interest and creation of a private right of action like that in the CVRA is rationally related to it. Major portions of defendants' briefs are devoted to showing that the CVRA fails strict scrutiny. We need not address these points because strict scrutiny does not apply.

a. The CVRA is not a law that imposes a racial classification on individuals and then uses it to confer a burden or benefit on all

Defendants argue that strict scrutiny applies here because it applies to any statute that refers to race or calls for any sort of race-conscious remedy or other action, even if it does not affect different races in different ways. They rely on cases like *Loving v. Virginia* (1967) 388 U.S. 1 (*Loving*) and *Johnson, supra*, 543 U.S. 499, which applied strict scrutiny to state laws that employed racial classifications but burdened persons of different races equally. In *Loving*, the Supreme Court invalidated a state law forbidding persons of different races to marry one another. The law was subject to strict scrutiny even though its burden was generally distributed. (*Loving, supra*, 388 U.S. at p. 8.) In *Johnson*, a policy of segregating state prison inmates by race during an initial evaluation period was held to be subject to strict scrutiny even though all prisoners were equally affected by it. (*Johnson, supra*, 543 U.S. at p. 506.)

What those cases hold is that a law classifying individuals by race and then imposing some kind of burden or benefit on the basis of the classification is subject to strict scrutiny even if persons of all races bear the burden or receive the benefit equally. In *Johnson*, for instance, the court rejected the state's argument that "strict scrutiny should not apply because all prisoners are 'equally' segregated." (*Johnson, supra*, 543 U.S. at p. 506.) It stated that this argument "ignores our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.'" (*Ibid.*)

What the cases do not hold is that a statute is automatically subject to strict scrutiny because it involves race consciousness even though it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or

groups. The CVRA confers on members of any racial group a cause of action to seek redress for a race-based harm, vote dilution. The creation of that kind of liability does not constitute the imposition of a burden or conferral of a benefit on the basis of a racial classification. If the CVRA were subject to strict scrutiny because of its reference to race, so would every law be that creates liability for race-based harm, including the FVRA, the federal Civil Rights Act, and California's Fair Employment and Housing Act.

Defendants argue that these antidiscrimination laws are, in fact, subject to strict scrutiny, but cite no cases subjecting them to it. Lacking that authority, they instead cite lower court cases subjecting federal antidiscrimination laws to analysis under the congruence and proportionality test of *City of Boerne v. Flores* (1997) 521 U.S. 507 (*Boerne*), which they describe as "obviously very similar to strict scrutiny." For example, the Court of Appeals subjected a provision of Title VII of the federal Civil Rights Act to a *Boerne* analysis in *In re Employment Discrimination Litigation* (11th Cir. 1999) 198 F.3d 1305, 1319-1324.

This argument does not work. The *Boerne* test has nothing to do with strict scrutiny. It has nothing in particular to do with the equal protection clause. It is about the source of constitutional power for Congress's enactment of certain types of statutes, not the constitutional right of individuals to be free from discrimination.

Briefly, the question presented in *Boerne* was whether Congress had authority under section 5 of the Fourteenth Amendment (the amendment's enforcement clause) to enact by statute a standard for protecting the free exercise of religion that was far more stringent than the standard the Supreme Court established under the free exercise clause of the First Amendment in an earlier case. Congress claimed the action was within its power under section 5 of the Fourteenth Amendment to enforce the due process clause of the Fourteenth Amendment, which in turn incorporated the

First Amendment and its free exercise clause. (*Boerne, supra*, 521 U.S. at pp. 512-517.) The court held that Congress lacked this authority because the standard Congress adopted was not congruent and proportional to the scope of the First Amendment right as the court itself had earlier defined it. (*Id.* at pp. 519-520, 532.)

From this summary, it can be seen that the fact that an antidiscrimination law like Title VII has been subjected by some courts to a *Boerne* analysis does not even remotely imply that laws of that kind violate individuals' rights against discrimination unless they pass strict scrutiny. Defendants go so far as to imply that the only reason strict scrutiny has never been applied to federal antidiscrimination laws is that the *Boerne* test applies to those laws instead; strict scrutiny is the test appropriate for state legislation while *Boerne* applies in federal law. This cannot be true. Strict scrutiny applies to all racially discriminatory laws. It does not apply to antidiscrimination laws because, like CVRA, they are not racially discriminatory.

Defendants argue that the "sky will not fall" if strict scrutiny is applied to antidiscrimination laws. It will not fall because those laws, unlike the CVRA, generally impose liability only upon a showing of intentional discrimination, and for that reason the laws would likely be upheld under strict scrutiny. This argument collapses as soon as it is applied to the FVRA. As noted above, section 2 of the FVRA does not require a showing of intentional discrimination. No court has ever suggested, to our knowledge, that strict scrutiny applies to section 2 of the FVRA and that it would fail for this reason.

Also unhelpful to defendants is the argument that *Shaw* and *Vera* stand for the proposition that strict scrutiny can be triggered by an anti-vote-dilution law even though it does not burden the rights of the White plaintiffs. Responding to Justice Souter's dissenting view in *Shaw* that race-based districting should not trigger strict scrutiny unless

another race's voting strength is harmed, the *Shaw* majority explained that "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." (*Shaw, supra*, 509 U.S. at p. 650.) Similarly, in *Vera*, the plurality responded to a dissenting comment by Justice Souter—that race-based, dilution-combating districts do not harm any class of voters—by referring to "harmful and divisive stereotypes" that the use of race may foster even if it does not involve any voting-related harm to the plaintiffs. (*Vera, supra,* 517 U.S. at pp. 983-984.)

Contrary to defendants' view, these statements do not mean the CVRA is subject to strict scrutiny even though it does not confer benefits or impose burdens on any particular racial group and does not burden anyone's right to vote. They only mean that districting plans that use race as the predominant line-drawing factor—and therefore amount to segregation of voters by race—are subject to strict scrutiny. A court might wish to impose that kind of districting plan as a CVRA remedy. Even so, as we will explain, applications of the statute not involving that type of remedy are readily conceivable, so this potential problem is not a basis for a *facial* challenge.

b. The CVRA does not deny anyone standing on the basis of membership in any group

So far we have only addressed the main thrust of defendants' argument in support of applying strict scrutiny: that the statute's reference to race is itself a racial classification. We turn next to a series of related minor arguments. The first of these is based on the trial court's view that the statute is racially discriminatory on its face

because its definition of "protected class" excludes some racial or ethnic groups. The CVRA defines a protected class as persons "who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)

The trial court took issue with the inclusion of "language minority group" in this definition. Its objection is based on an error made in reviewing the federal standard that the CVRA incorporates. Its order quoted Title 42 United States Code section 1973b(f)(1), a provision stating congressional findings on the deleterious effects of English-only elections. The provision states that "voting discrimination against citizens of language minorities is pervasive" and that "[s]uch minority citizens are from environments in which the dominant language is other than English." The trial court believed this was the federal statutory definition of "language minority group" to which the CVRA refers. On that basis, it concluded that the CVRA denies standing to English speakers. Then the trial court quoted 28 Code of Federal Regulations part 51.2 (2003), which states that "language minority group" means "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." The court believed this further restricted the meaning of the term, so as to exclude, for example, speakers of Polish or Portuguese. These restrictions, the court ruled, denied standing to ethnic groups who speak the purportedly excluded languages. That, in turn, triggered strict scrutiny, which the statute failed.

In reality, the regulation the court referred to merely restated the *actual* federal statutory definition of "language minority group," which is found at Title 42 United States Code section 1973l(c)(3): "The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." This provision uses and defines the precise phrase ("language minority group") contained in the

CVRA. The only logical conclusion is that this is the definition the Legislature intended to incorporate. There is no reason to think it also meant to include the language from Title 42 United States Code section 1973b(f)(1) about "environments in which the dominant language is other than English," which does not use the phrase "language minority group" and which states a congressional finding, not a definition.

Consequently, despite its name, the classification "language minority group" does not define any group in terms of language, and the trial court relied on a mistaken understanding of the statute. The term simply identifies four specific racial or ethnic groups as belonging to a protected class. The definition refers to these as racial or ethnic groups ("persons who are American Indian," etc.), not in terms of their language. As plaintiffs explain, the category "language minority group" was added to the FVRA in 1975 for the purpose of ensuring that courts would not mistakenly exclude American Indians, Asian Americans, Alaskan Natives, and Hispanics from coverage under the statute, even though each group was already included in the category "race." (See Sen.Rep. No. 94-925, 1st Sess. (1975), reprinted in 1975 U.S. Code Cong. & Admin. News, pp. 774, 814 ["The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as 'language minorities' are members of a 'race or color' group ...."].)

The four language minority groups are, therefore, on the same footing as Whites, persons of Polish or Portuguese ancestry, or any other racial or ethnic group. In a variety of contexts, the Supreme Court has held that the term "race" is expansive and covers all ethnic and racial groups. (*Rice v. Cayetano* (2000) 528 U.S. 495, 512 [15th Amendment's prohibition on abridgment of right to vote on account of race "grants protection to all persons, not just members of a particular race"]; *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 610, 613 [prohibition of racial discrimination

in 42 U.S.C. § 1981 protects all persons from discrimination based on their "ancestry or ethnic characteristics"; court is "quite sure" White people are protected]; *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 280 [prohibition on discrimination because of race in Title VII applies to Whites and non-Whites alike].) The inclusion of "language minority groups," as defined by the statute, only reinforces the proposition that American Indians, Asian Americans, Alaskan Natives, and Hispanics are among the racial or ethnic groups that can constitute a protected class. It does not deny standing to anyone.

The trial court cited *Polish American Congress v. City of Chicago* (N.D.Ill. 2002) 211 F.Supp.2d 1098 for the proposition that "the federal courts have interpreted the definition of protected class under 42 U.S.C. [section] 1973 so as to exclude Polish speakers from those having standing to sue," but that is not what that case held. The court simply stated that Polish-Americans were not one of the four groups included in the statutory definition of "language minority group." (*Polish American Congress v. City of Chicago, supra,* at p. 1107.) The court did not consider whether Polish-Americans had standing under the FVRA as a "race" and the plaintiffs apparently did not argue that they did. A case is not authority for a proposition it did not consider. (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1318.)

The trial court's view would likely justify strict scrutiny and facial invalidation if it represented a correct reading of the statute, but it does not. Even if it were a *plausible* reading of the statute, it would be both possible and necessary under the constitutional avoidance doctrine to construe it as we have: All persons have standing under the CVRA to sue for race-based vote dilution because all persons are members of a race.

c. The CVRA is not an affirmative action law

Defendants characterize the CVRA as an affirmative action statute and rely on affirmative action cases to argue that it is subject to strict scrutiny. The CVRA is not an affirmative action statute because, unlike affirmative action laws the Supreme Court has struck down, it does not identify any races for conferral of preferences. In *Gratz v. Bollinger* (2003) 539 U.S. 244, for instance, the Supreme Court applied strict scrutiny and struck down a university's affirmative action admission program. The program conferred 20 points, on a scale of 1 to 150, on applicants belonging to a specified set of racial groups. This advantage could increase a low waitlist score to an automatic admit score. (*Id.* at pp. 251, 255). In *Richmond v. J. A. Croson Co., supra*, 488 U.S. 469, the court applied strict scrutiny and struck down a city's program of affirmative action in government contracting. The program commanded that 30 percent of the money spent on city building contracts be paid to subcontracting firms owned by members of a specified set of racial groups. (*Id.* at pp. 477-478, 511.) The CVRA does nothing similar. We cannot subject the CVRA to strict scrutiny on the ground that affirmative action programs are subject to strict scrutiny.

d. The CVRA does not burden the fundamental right to vote

As we have said, strict scrutiny under the equal protection clause can be triggered by a classification used to burden a fundamental right, and voting is treated as a fundamental right in this context. Separately from their racial discrimination argument, defendants contend that the CVRA is subject to strict scrutiny because it "impos[es] liability on the basis of voting ...." This is not correct. It is true that the CVRA requires a showing of racially polarized voting as an element of liability, but that does not mean any person or group of people is held liable for voting or for how they voted. The liability is that of the government entity that

maintains the voting system, and it is imposed because of dilution of the plaintiffs' votes.

A prime example of a violation of the equal protection clause through a burden on the right to vote is malapportioned districts, i.e., those that violate the one-person, one-vote rule by having unequal populations. (*Reynolds v. Sims* (1964) 377 U.S. 533, 568.) The CVRA involves nothing similar. Cases reviewing districts created predominantly on the basis of race presumably are another example, even though the opinions in those cases focus on the suspect racial classification rather than on the fundamental right to vote. However, the possibility of some court imposing an unconstitutional remedy under the CVRA in some cases is not, as we have said, a basis for *facial* invalidation.

e. The CVRA does not burden any First Amendment right

Defendants also argue that the CVRA is subject to strict scrutiny because it burdens fundamental rights protected by the First Amendment:

> "Voter preferences that underlie racially polarized voting, moreover, are political views protected against infringement by the First Amendment. The votes themselves are expressions of political preferences about candidates and ballot measures. Bloc voting, then, represents a coalition of political interests that lie close to the core of the freedom of political association."

Defendants may be correct in arguing that racially polarized voting constitutes political expression protected by the First Amendment. But the CVRA does not burden anyone's right to engage in racially polarized voting. It only makes racially polarized voting part of the predicate for a

government entity's liability for racial vote dilution. In doing so, it is comparable to the FVRA. The *effect* of racially polarized voting—election of monoracial city councils and the like—may be and is intended to be reduced by the application of the CVRA. But no voter has a right to a voting system that chronically and systematically brings about that effect. We do not understand defendants to argue the contrary.

f. The fact that the CVRA addresses a racial issue does not show that the Legislature acted with an invidious purpose

A facially neutral law is subject to strict scrutiny if it was adopted for a racially discriminatory purpose. (*Miller v. Johnson* (1995) 515 U.S. 900, 913.) Defendants argue that, even if the CVRA is facially neutral, it is subject to strict scrutiny because it was "enacted solely for racial purposes, i.e., to remedy racial bloc voting in at-large" voting systems. Defendants contend that plaintiffs admit this by "assert[ing] that the [CVRA] is an antidiscrimination statute intended to remedy" racially polarized voting.

This is incorrect for essentially the same reason that defendants are mistaken in claiming that the statute is subject to strict scrutiny because it contains a facial reference to race. A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose no more than its use of the word "race" in an antidiscrimination statute renders the statute racially discriminatory. An intent to remedy a race-related harm may well be combined with an improper use of race, as in an affirmative action program that uses race in an improper way. The CVRA does not, however, have the latter component. Upon a finding of liability, it calls only for "appropriate remedies" (§ 14029), not for any particular, let alone any improper, use of race.

g. Differences between the CVRA and the FVRA do not automatically render the CVRA unconstitutional

Defendants devote almost half of the argument portion of their brief to attempting to show that the CVRA contains "dramatic departures from the FVRA" which amount to an "extraordinary expansion of federal law." To the extent that this may be intended as an independent argument that the CVRA is unconstitutional, it is without merit. There is no rule that a state legislature can never extend civil rights beyond what Congress has provided. State law may, of course, be preempted by federal law if inconsistent with it, but defendants have not made a preemption argument. To the extent that this discussion may be intended to make the narrower point that the CVRA is not narrowly tailored to effectuate a compelling government interest—i.e., that it fails strict scrutiny—we will disregard it, since we hold that strict scrutiny does not apply.

2. Potential unconstitutional applications cannot show facial invalidity

Defendants' arguments are partially based on Supreme Court cases that struck down specific redistricting plans drawn up partly to avoid racial vote dilution that might violate section 2 of the FVRA. Because those cases only address specific actions taken by states to cure racial vote dilution (i.e., the creation of particular districts), their impact here relates only to the validity of specific applications of the CVRA—applications that at this point are hypothetical. Under the facial-invalidity standard set forth in *Salerno, supra*, 481 U.S. at page 745, therefore, the cases cannot establish that the CVRA is facially invalid. (To be sure, defendants contend that none of their arguments are addressed to mere remedies issues and that all are instead addressed to the criteria for liability under the CVRA and prove that those criteria are subject to strict scrutiny. As explained earlier, they are not subject to strict scrutiny.)

Shaw, supra, 509 U.S. 630 was the first in this line of cases. It held, as mentioned earlier, that a redistricting plan was subject to strict scrutiny because it could not rationally be understood as anything but an effort to separate voters on the basis of race. The plurality opinion in *Vera* made a similar point. There is no doubt that any district-based remedy the trial court might impose using race as a factor in drawing district lines would be subject to analysis under the *Shaw-Vera* line of cases. In reviewing a district-based remedy, it would be necessary to determine whether race was the predominant factor used in drawing the district lines. If it was, the plan would be subject to strict scrutiny.

It is equally apparent that this does not mean the CVRA must pass strict scrutiny in order to withstand a facial challenge. Whether one potential remedy under a statute would be subject to strict scrutiny if imposed is not the test for facial invalidity of the statute. Defendants' argument, to be successful, would have to be not only that unconstitutional remedies are consistent with the CVRA, but that they are mandated by it. They are not.

III. Gift of public funds

Although no fee motion was ever made, the trial court found the CVRA's attorney-fee provision to be invalid. That provision states as follows:

> "In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standards established in Serrano v. Priest (1977) 20 Cal.3d 25, 48-49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to

> be frivolous, unreasonable, or without foundation." (§ 14030.)

Relying on *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450-451 (*Jordan*), the trial court ruled that this section violated article XVI, section 6, of the California Constitution, which forbids the Legislature to "make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation ...." The court interpreted *Jordan* to mean that "[a] lawsuit against a public entity which results in no change whatever in the status quo ante serves no public purpose, and does not constitute a valid claim against the public for attorney fee and cost purposes."

The court then applied this purported rule to a hypothetical:

> "If a California city has at large city council election plus one (1) voter of Alaskan native ancestry who repeatedly runs for the council and always gets just one vote (his own) and files suit under the California Voting Rights Act, he would be a prevailing party under the Act though no remedy is possible, and so be entitled to attorney fees and expenses. Defendants contend, and Plaintiffs do not dispute, that a local government cannot be required to carve an electoral district for an impossibly small number of voters (such as this hypothetical's one Alaskan native). [Citations.] While it is doubtful this hypothetical city could be sued every day under the Act in this situation, it could probably be sued every election cycle, and have to pay attorney fees over and over for a situation it cannot remedy or avoid."

The court violated two rules of constitutional decisionmaking in invalidating the section. First, a court should not decide constitutional questions unless required to do so. (*People v. Pantoja, supra*, 122 Cal.App.4th at p. 10.) Here, no party moved for attorney fees, so the validity of the fee statute was not at issue. The court should not have addressed or answered the question.

Second, the court's ability to think of a single hypothetical in which the application of a statute would violate a constitutional provision is not grounds for facial invalidation. Facial invalidation is justified only where the statute could be validly applied under *no* circumstances. (*East Bay Asian Local Development Corp. v. State of California, supra*, 24 Cal.4th at p. 709.) Circumstances in which the objection the court raises would not be present are easy to imagine. If, on remand, the court finds liability *in this case* but is unable to formulate a permissible remedy *in this case*, then the court will have an opportunity to decide whether the application of section 14030 would be unconstitutional *in this case*. It has not had that opportunity yet. We express no opinion here on whether a fee award would be barred under those circumstances since doing so is premature.

IV. Issues on remand

The parties have raised several issues in this appeal that the trial court never decided and that we need not decide now. We repeat them here for convenience:

- What elements must be proved to establish liability under the CVRA?

- Is the court precluded from employing crossover or coalition districts (i.e., districts in which the plaintiffs' protected class does not comprise a majority of voters) as a remedy?

- Is the court precluded from employing any alternative at-large voting system as a remedy?

- Does the particular remedy under contemplation by the court, if any, conform to the Supreme Court's vote-dilution-remedy cases?

The court's answers to these questions will determine the scope of relief, if any, available to plaintiffs. The logical limit in one direction would be a conclusion that plaintiffs can obtain under the CVRA only the same relief that they could have obtained under the FVRA. The logical limit in the other direction would be the conclusion that, upon proof of racially polarized voting, plaintiffs will be entitled to the most appropriate remedy, among the remedies we have discussed, that does not result in unconstitutionally drawn districts under the Supreme Court's rulings.

DISPOSTION

The judgment is reversed and the case remanded to the trial court for further proceedings. Plaintiffs shall recover their costs on appeal.

Defendants' motion to strike, filed February 10, 2006, is denied. The request for leave to submit supplemental briefing included in the motion to strike is granted and the supplemental brief incorporated in the motion is deemed filed.

The following requests are granted: Motion of Appellants Requesting Judicial Notice (filed September 15, 2005); Supplemental Motion of Appellants Requesting Judicial Notice (filed January 31, 2006); Second Motion of Respondents Requesting Judicial Notice (filed February 6, 2006); Request for Judicial Notice contained in defendants' Answer to Brief of Amici Curiae Common Cause and FairVote (filed March 22, 2006); Third Motion of

Respondents Requesting Judicial Notice (filed July 20, 2006).

/s/_____
Wiseman, J.

WE CONCUR:

/s/_____
Harris, Acting P. J.

/s/_____
Cornell, J.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF STANISLAUS

Ordered April 7, 2005 - Filed April 13, 2005

ENRIQUE SANCHEZ, ET AL.,

Plaintiffs,

v.

CITY OF MODESTO, ET AL.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
(California Rule of Court 204.1 to 212)
(Case No. 347903)

On October 4, 2004, Defendants City of Modesto, Jean Zahr, Jim Ridenour, Bob Dunbar, Janice Keating, Garrad Marsh, Will O'Bryant, Denny Jackman and Brad Hawn filed a motion for judgment on the pleadings in this matter. Plaintiffs filed an opposition brief and defendants filed a reply. On January 6, 2005, the Court submitted questions to the parties and requested additional briefing on those questions. As a result of this Court's request, the parties submitted additional briefs.

Having read the briefs submitted by the parties, this Court issued its tentative ruling granting Defendants' Motion for Judgment on the Pleadings on March 24, 2005. Tentative Ruling is attached as Exhibit A hereto. Pursuant to Stanislaus County Court rules, Plaintiffs declined the

opportunity to argue the merits of this matter at the hearing set for March 25, 2005 and the Tentative Ruling thus became final.

Therefore, this Court formally adopts the reasons set forth in the Tentative Ruling as its reasons for granting Defendants' Motion for Judgment on the Pleadings.

IT IS SO ORDERED.

Dated: April 7, 2005

/s/ Roger M. Beauchesne
Judge - Stanislaus County
Superior Court

EXHIBIT A
TENTATIVE RULING ANNOUNCEMENT

Friday, March 25, 2005

[*Irrelevant material excluded from text*]

347903 - SANCHEZ VS. CITY OF MODESTO: Defendant City of Modesto's Motion for Judgment on the Pleadings, Continued from 1/05/05 - **GRANTED** without leave to amend. The California Voting Rights Act violates the federal and state constitutions in the following ways:

1) It violates the equal protection clause of the 14th amendment to the United States Constitution on its face due to use of federal definitions of "protected class" but does not have the required "sunset" provision – terminates automatically within a few years – which enables racially discriminatory statutes to survive constitutional attack;

2) It violates the equal protection clause of the 14th amendment to the United States Constitution on its face but its legislative record lacks the required findings concerning need and remedial effect;

3) Its liability without remedy clause makes its attorney fee and cost provision a violation of article XVI, section 6, of the California Constitution as a gift of public funds. This cannot be remedied due to the absence of a severance clause.

Elections Code section 14026(d) states that the California Voting Rights Act uses the definition of "protected class" "as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." Where federal statutes are involved, "in determining their meaning and effect the state courts are bound by the interpretation put upon them by the courts of the United States." *MacKenzie v. Hare* (1913) 165 Cal. 776, 779.

Elections Code section 14032 gives standing to sue under the California Voting Rights Act only to members of protected classes. The parties disagree as to whether the federal definition of protected class excludes Caucasians, but agree that it does exclude English speakers. 42 U.S.C. 1973b(f)(1) specifically prohibits voting discrimination against "citizens of language minorities", which are defined as: "Such minority citizens are from environments in which the dominant language is other than English." This specifically includes Spanish speakers, aka Hispanics. 28 Code of Federal Regulations (C.F.R.) section 51.2, states (Court's emphasis):

"Language minorities or language minority group is used, as [sic] defined, in the Act [federal Voting Rights Act], to refer to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage."

28 C.F.R. 51.2 redefines "language minority" from its plain meaning of those who predominantly speak a non-English language into not merely "ethnicity", but confines it to a limited number of specified ethnic groups.

Not all ethnic minorities have standing to sue under the Federal Voting Rights Act – the federal courts have interpreted the definition of protected class under 42 U.S.C. 1973 so as to exclude Polish speakers from those having standing to sue. Polish-American Congress v. City of Chicago (2002) 211 F.Supp. 1098, 1107.

A statutory classification based on ethnicity or language is suspect, just as classifications based on race or national origin. Olagues v. Russoniello (9th Cir. 1986) 797 F.2d 1511, 1520-1521.

42 U.S.C.b(f)(1) [*sic*], as interpreted by 28 C.F.R. 51.2 and subsequent federal opinions, and incorporated into the California Voting Rights at Elections Code section 14026(d), uses "suspect classifications" meriting strict constitutional scrutiny. It gives standing to persons of Spanish ancestry but not to those of Polish or Portuguese ancestry.

The goals advanced by the 14th Amendment's equal protection clause are as impaired by laws which discriminate between speakers of different languages, or of language-based ethnicity, as by laws which discriminate between persons of different races. Plaintiff's opposing memo admits this at 10:15-24 (Court's emphasis):

"The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." Equal protection analysis always begins by determining whether - or how - the government is distinguishing among people. Thus, in order to determine if strict scrutiny review is even warranted, the first inquiry is whether the government is creating a racial classification at all." . . . If the statute does not employ a racial (or otherwise suspect) classification, it is subject to rational basis review under the equal protection clause."

Shaw v. Reno (1993) 509 U.S. 630, 642-643 states:

"No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. Express racial classifications are immediately suspect because, absent searching judicial inquiry . . ., there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."

Connerly v. State Personnel Board (2001) 92 Cal.App.4th 34, 44-45, states (Court's emphasis):

"Where a statutory scheme, on its face, employs a suspect classification, the scheme is, on its face, in conflict with the core prohibition of the equal protection clause. It is not entitled to a presumption of validity and is instead presumed invalid. And the express use of suspect classifications in a statutory scheme immediately triggers strict scrutiny review."

Plaintiffs have the burden of proving that the California Voting Rights Act is valid once defendants establish that it merits strict scrutiny. Plaintiffs did not meet that burden. Plaintiffs could not meet that burden. There is no time limit in the Act. This was fatal in the opinion of the Third District Court of Appeal in Connerly v. State Personnel Board (2001) 92 Cal.App.4th 34, holding at 64-65 (Court's emphasis):

"The statutory scheme does not arguably withstand strict scrutiny. No justification has been shown. There was no specific finding of identified prior discrimination in the contracting for professional bond services. There was no effort to measure the remedy against the consequences of identified discrimination. There was no effort to limit recovery to those who actually suffered from prior discrimination. There was no showing that non-race based and non-gender-based remedies would be inadequate or even considered. The scheme is unlimited in duration. And,

except for its limitation to citizens and lawfully admitted aliens, the scheme is unlimited in reach."

Parents Involved v. Seattle School Dist. (2001) 377 Fed.3d 949, 969, states (9th Circuit's emphasis): "Sixth, and finally, any program of racial preferences, regardless of its ultimate aspirations, must be *time-limited*."

The presence of a time limit, though, does not save a statute from constitutional attack if it is not supported by adequate findings of need. That happened in City of Richmond v. Croson (1989) 488 U.S. 469, 511:

"Proper findings are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. '[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious or racial group with the political strength to negotiate a 'piece of the action' for its members."

The legislative record for the California Voting Rights Act has no findings of need whatever. It makes the legislative intent clear - they seek to overturn the law underlying certain rulings limiting remedies for racially polarized aka Hispanic vs. non-Hispanic voting to instances where elective districts can be formed with a majority of Hispanic voters. The legislature, however, failed to specify the need for this, which results in a failure to prove any of the many other things necessary to survive strict scrutiny - that the remedies are tailored to deal only with the proven need and not create further constitutional violations, etc.

The legislature could have borrowed related federal findings of need, in particular those concerning discrimination against Hispanic voters used to justify the federal Voting Rights Act, Justice Department records concerning California counties subject to mandatory "pre-clearance" requirements (42 USC 1973c) due to past discrimination against Hispanic voters, and the records of California state and federal trial and appellate cases concerning voting rights discrimination against Hispanic voters. The legislature was certainly aware of the latter - it adopted the California Voting Rights Act because it disagreed with those cases which found that relief could not be granted because no districts with Hispanic majorities could be created. But the legislature neglected to incorporate the records of any of these three types of proceedings into the legislative record of the California Voting Rights Act.

Plaintiffs' counsel shows some awareness of this, and requested judicial notice of part of the congressional record for the federal 1965 Voting Rights Act, but Defendants properly object to that on the grounds that only a partial record was supplied. Plaintiffs must present the whole record if they want judicial notice of it, in addition to evidence that it was incorporated into the legislative record. Defendants also object to Plaintiffs' request for judicial notice of some unsigned & inadequately authenticated letters from the Justice Department. Those objections are also sustained.

Plaintiffs have not presented any evidence of need for the suspect classifications in the California Voting Rights Act. At most Plaintiffs' opposing memorandum cites two instances, at page 8, where federal district courts rejected Hispanic voting rights claims for inability to establish that the Hispanic minority voters could be provided with an elective district where they could form a majority. Skorepa v. City of Chula Vista (S.D. Cal. 1989) 723 F.Supp. 1384, 1390, and Aldasoro v. Kennerson (S.D. Cal. 1995) 922 F.Supp. 339, 369. Had this statute been limited to areas of California subject to the Justice Department's "pre-

clearance" requirements, and incorporated the federal findings justifying the pre-clearance requirement, Plaintiffs would have a better argument.

But the California Voting Rights Act is not limited to such areas. It applies to all of California, while there are no findings whatever in the legislative record of need for this statute. The Court does not know the scope of the injury at issue, which means there is no way to determine if there is a need for any action at all or if the new constitutional injury created by the Act is outweighed by the scope of the injury the Act purports to cure. Nor can the Court determine if the remedy created by the Act is limited only to that necessary to cure the injury from racially polarized voting, because there is no evidence whatever of the extent of injury.

Election Code section 14027(a) states: "A violation of section 14027 is established if it is shown that racially polarized voting occurs ..." Election Code section 14027(c) states: "The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy." Election Code section 14030 provides a prevailing plaintiff with reasonable attorney fees and "litigation expenses, including but not limited to, expert witness fees and expenses as part of the costs."

Plaintiffs under the Act can obtain these attorney fees and expenses merely by establishing that racially polarized voting occurs in a public entity's elections, whether or not any remedy is possible. If a California city has at large city council elections plus one (1) voter of Alaskan native ancestry who repeatedly runs for the council and always gets just one vote (his own) and files suit under the California Voting Rights Act, he would be a prevailing party under the Act though no remedy is possible, and so be entitled to attorney fees and expenses. Defendants contend, and Plaintiffs do not dispute, that a local government cannot be

required to carve an electoral district for an impossibly small number of voters (such as this hypothetical's one Alaskan native). Holder v. Hall (1994) 512 U.S. 874, 881. See Defendants' moving memorandum at 15:9-12 & 15:23-28. While it is doubtful this hypothetical city could be sued every day under the Act in this situation, it could probably be sued every election cycle, and have to pay attorney fees over and over for a situation it cannot remedy or avoid.

This is an invalid gift of public funds under article XVI, section 6 of the California Constitution. A lawsuit against a public entity which results in no change whatever in the status quo ante serves no public purpose, and does not constitute a valid claim against the public for attorney fee and cost purposes. Jordan v. Department of Motor Vehicles (2002) 100 Cal.App.4th 431, 450-451 held (this Court's emphasis):

"Section 6 of article XVI of the California Constitution provides that the Legislature has no power "to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation . . . ." The term "gift" in the constitutional provision "includes all appropriations of public money for which there is no authority or enforceable claim," even if there is a moral or equitable obligation. "An appropriation of money by the legislature for the relief of one who has no legal claim therefore must be regarded as a gift within the meaning of that term, as used in this section, and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration."

"It is well settled that the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of this constitutional prohibition.

The settlement of a good faith dispute between the state and a private party is an appropriate use of public funds and not a gift because the relinquishment of a colorable legal claim in return for settlement funds is good consideration and establishes a valid public purpose. The compromise of a wholly invalid claim, however, is inadequate consideration and the expenditure of public funds for such a claim serves no public purpose and violates the gift clause."

The Court is mindful of a trial court's limited role in evaluating constitutional challenges to legislative enactments. Plaintiffs correctly argue: "[I]t is an established canon of statutory construction that statutes must be construed, if possible, to render them constitutional." See, e.g., In re Marriage of Steiner and Hosseini (2004) 117 Cal.App.4th 519, 529. Nevertheless, the arguments presented by Defendant compel the Court to find the California Voting Rights Act unconstitutional.

[*Irrelevant material excluded from text*]

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF STANISLAUS

Signed April 18, 2005 - Filed April 19, 2005

ENRIQUE SANCHEZ, ET AL.,
Plaintiffs,

v.

CITY OF MODESTO, ET AL.,
Defendants.

JUDGMENT OF DISMISSAL
(Case No. 347903)

On April 13, 2005, this Court entered a final order granting Defendants' Motion for Judgment on the Pleadings without leave to amend.

Therefore, Judgment shall be entered that this matter is DISMISSED.

Dated: April 18, 2005

/s/ Roger M. Beauchesne
Roger M. Beauchesne
Judge - Stanislaus County
Superior Court

Entered as a Judgment on April 19, 2005

APPENDIX D

Court of Appeal, Fifth Appellate District - No. F048277

S149500

IN THE SUPREME COURT OF CALIFORNIA

En Banc

Supreme Court Filed March 21, 2007

ENRIQUE SANCHEZ, *ET AL.*,

PLAINTIFFS AND APPELLANTS,

v.

CITY OF MODESTO, *ET AL.*,

DEFENDANTS AND RESPONDENTS

The Petition for Review is DENIED.

/s/ GEORGE
Chief Justice

APPENDIX E

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 7, 2007

Mr. John E. McDermott
Howrey LLP
550 S. Hope Street
Suite 1100
Los Angeles, CA 90071

Re: City of Modesto, California, et al.
v. Enrique Sanchez, et al.
Application no. 06A1140

Dear Mr. McDermott:

The Application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on June 7, 2007 extended the time to and including July 19, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Ruth Jones/*by EAF*
Ruth Jones
Case Analyst

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. John E. McDermott
Howrey LLP
550 S. Hope Street
Suite 1100
Los Angeles, CA 90071

Clerk
Court of Appeal of California, Fifth Appellate District
2525 Capitol Street
Fresno, CA 93721

APPENDIX F

CALIFORNIA ELECTIONS CODE
Division 14. Election Day Procedures
Chapter 1.5 Rights of Voters

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§ 14025. Short title

This act shall be known and may be cited as the California Voting Rights Act of 2001.

§ 14026. Definitions

As used in this chapter:

(a) "At-large method of election" means any of the following methods of electing members to the governing body of a political subdivision:

(1) One in which the voters of the entire jurisdiction elect the members to the governing body.

(2) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.

(3) One which combines at-large elections with district-based elections.

(b) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.

(c) "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a city, a school district, a community college district, or other district organized pursuant to state law.

(d) "Protected class" means a class of voters who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 973 et seq.).

(e) "Racially polarized voting" means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.

§ 14027. Limitations on at-large method of election

An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.

§ 14028. Violation of Section 14027; Determination of racially polarized voting

(a) A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for

members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

(b) The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.

(c) The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy.

(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(e) Other factors such as the history of discrimination, the use of electoral devices or other voting

practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section.

§ 14029. Imposition of district-based elections

Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.

§ 14030. Attorney's fees

In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standards established in Serrano v. Priest (1977) 20 Cal.3d 25, 48-49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

§ 14031. Legislative intent

This chapter is enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution.

§ 14032. Persons who may file action

Any voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located.

APPENDIX G

[Names of counsel omitted from text]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF STANISLAUS

Filed June 3, 2004

ENRIQUE SANCHEZ, EMMA PINEDO, AND SALVADOR VERA
Plaintiffs,

v.

CITY OF MODESTO, JEAN ZAHR, JIM RIDENOUR, BOB DUNBAR, JANICE KEATING, GARRAD MARSH, WILL O'BRYANT, DENNY JACKMAN, AND BRAD HAWN
Defendants.

COMPLAINT FOR VIOLATION OF THE CALIFORNIA VOTING RIGHTS ACT OF 2001
(Case No. 347903)
FILED BY FAX

Plaintiffs ENRIQUE SANCHEZ, EMMA PINEDO, AND SALVADOR VERA ("Plaintiffs") allege as follows:

NATURE OF THE CASE

1. This action is brought by Plaintiffs for injunctive relief against the City of Modesto (hereinafter "the City") for its violation of the California Voting Rights Act of 2001 (hereinafter the "Act"). The imposition of the City's at-large method of election has resulted in vote dilution for Latino residents and has denied them effective political participation in local elections. The City's electorate votes in a racially polarized manner, with the numerical superiority of

the rest of the electorate regularly defeating the collective will of Latino voters. The City's at-large method of election prevents Latino residents from electing candidates of their choice or influencing the outcome of City elections.

2. The effects of the Modesto at-large method of election are apparent and compelling. Despite a Latino population of approximately 25.6% in the City, no Latino occupies a seat on the City Council. This current lack of Latino representation on the City Council reveals a lack of access to the political process, which is further demonstrated by the historical fact that only one Latino has ever been elected to the City Council since 1911.

3. The City's at-large method of election violates the California Voting Rights Act of 2001. Plaintiffs bring this action to enjoin the City's continued abridgment of Latino voting rights. Plaintiffs seek a declaration from this Court that the at-large method of election currently used by the City violates the Act. Plaintiffs seek injunctive relief enjoining the City from further imposing or applying its current at-large method of election. Further, plaintiffs seek injunctive relief requiring the City to design and implement district-based elections tailored to remedy the City's violation of the Act.

PARTIES

4. Plaintiff ENRIQUE SANCHEZ ("Sanchez") is and at all times mentioned herein was a resident of the City of Modesto, California and eligible to participate in the City's elections. Sanchez is Latino and is a member of a protected class under the Act.

5. Plaintiff EMMA PINEDO ("Pinedo") is and at all times mentioned herein was a resident of the City of Modesto, California and eligible to participate in the City's elections. Pinedo is Latino and is a member of a protected class under the Act.

6. Plaintiff SALVADOR VERA ("Vera") is and at all times mentioned herein was a resident of the City of Modesto, California and eligible to participate in the City's elections. Vera is Latino and is a member of a protected class under the Act.

7. Defendant City of Modesto is situated in the County of Stanislaus and is a political subdivision within the State of California.

8. Defendant Jean Zahr is the Modesto City Clerk and has charge of all City elections.

9. Defendant Jim Ridenour is the current Mayor of the City of Modesto and is a member of the Modesto City Council.

10. Defendant Janice Keating is the current Vice Mayor of the City of Modesto and is a Modesto City Council member and occupies Chair 2 of the Modesto City Council.

11. Defendant Bob Dunbar is a Modesto City Council member and occupies Chair 1 of the Modesto City Council.

12. Defendant Garrad Marsh is a Modesto City Council member and occupies Chair 3 of the Modesto City Council.

13. Defendant Will O'Bryant is a Modesto City Council member and occupies Chair 4 of the Modesto City Council.

14. Defendant Denny Jackman is a Modesto City Council member and occupies Chair 5 of the Modesto City Council.

15. Defendant Brad Hawn is a Modesto City Council member and occupies Chair 6 of the Modesto City Council.

JURISDICTION AND VENUE

16. All parties hereto are within the unlimited jurisdiction of this Court. Venue in this Court is proper in that this is an action against the City of Modesto and its officials. All Defendants are situated in the County of Stanislaus, where violations of the Act have and, unless enjoined, will continue to occur.

BACKGROUND FACTS

17. The City of Modesto sits in the heart of the San Joaquin Valley. Today, Modesto is the largest city in Stanislaus County ("the County") and is the County seat.

18. The City's population has grown from 4,500 in 1910 to over 200,000 today. Although the City is diverse, it is segregated. Highway 99, which runs from northwest to southeast Modesto, is understood by locals to be the geographic divider of the City. Since at least the end of World War II, a large number of poorer Latinos have been living in the southwestern region of the City.

19. **Modesto City Council.** Modesto's City Charter provides for the council-manager form of government. The City Council serves as the legislative and policy making body of the City and is comprised of seven members, one of whom is the Mayor. The City Council is divided into six Chairs.

20. **Racial Imbalance**. Latinos comprise approximately 25.6% of the City's population. However, none of the current City Council members are Latino. No Latino has occupied a City Council seat since 1991 when Balvino Irizarry, the only Latino to ever hold this post, left office.

21. This imbalance cannot be explained by a lack of Latino candidates for office. Latino candidates have run for City Council on numerous occasions, including in the

1999, 2001, and most recently 2003 elections. In all instances, Latino candidates have been unsuccessful.

22. The City Council has a history of being governed by a limited choice, often concentrated in a small geographic area of this large and diverse city. For the past 30 years, nearly every City Council member elected has been from the northern, central and eastern parts of the City.

23. The City's at-large method of election prevents Latino voters from electing candidates of their choice or even influencing the outcome of elections. The City's at-large method of election, together with a racially polarized electorate, has for years caused the dilution of voting rights of its Latino residents.

THE CITY'S AT-LARGE METHOD OF ELECTION

24. **At-Large Method of Election.** Modesto's City Council elections are governed by the City Charter. As amended in 1980 and 1989, Article V Section 501 of the Charter specifically states that "Councilmembers shall be elected at the regular municipal election on a general ticket from the City *at large*." (emphasis added)

25. Under its current design, the City's at-large method of election allows voters of the entire jurisdiction to elect members to the City Council. The City Charter allows any candidate to run citywide. A candidate is not required to live in the district that he or she represents. In turn, any eligible voter may vote for each candidate, regardless of where the voter resides.

26. The City Council has six chairs. Each chair is the functional equivalent of a numbered post. The six City Council members are elected to numbered Chairs of four-year terms. The terms are staggered. Elections occur in November of odd-numbered years. There is a majority vote

requirement. Runoff elections are held in December, if necessary.

27. **District-Based Elections Compared.** The City's at-large method of election is different from district-based elections. A district-based election is a method of electing members to the City Council in which the candidate must reside within an election district that is a divisible part of the City and is elected only by voters residing within that election district. Plaintiffs here seek a court-order imposing district-based elections.

28. **Racially Polarized Voting Exists.** The City's racially polarized electorate, in the context of an at-large method of election, poses the paradigm violation contemplated by the California Voting Rights Act of 2001. Racially polarized voting exists here in Modesto because there is a difference in the choice of candidates or other electoral choices that are preferred by Latino voters, and in the choice of candidates or electoral choices that are preferred by voters in the rest of the electorate. In other words, members of the Latino population tend to vote the same way, while contemporaneously voting differently from the rest of Modesto's voters.

29. As a voting bloc, the City's Latino voters consistently prefer candidates that differ from those preferred by the rest of the electorate. As well, Latino voters consistently take positions on ballot measures and initiatives that sharply contrast the choices of the rest of the electorate.

30. Past election results from state propositions, City measures, and City Council races demonstrate these differences. Without limitation, Plaintiffs are informed and believe that the following elections comprise a non-exhaustive account of instances of racially polarized voting in Modesto.

31. **City Council Chair 1 (2003).** Dave Lopez, Bob Dunbar and Jeff Perine ran for City Council Chair 1.

32. Lopez was the only Latino in the race. Dunbar and Perrine are white. Plaintiffs are informed and believe that election statistics will show that racially polarized voting occurred. Latino voters supported Lopez, while the rest of the electorate gave their support to Dunbar and Perrine. Lopez was eventually defeated in a run-off election for Chair I with a majority of voters supporting Dunbar.

33. **2001 Elections.** In addition to two open chairs on the City Council, for which Latino candidates ran unsuccessfully, a key issue in the 2001 elections, included a ballot measure regarding the implementation of district-based elections.

34. **Chair 2.** Armour Smith (incumbent), Janice Keating, David Lopez, Dale Gene Williams, and Miguel Donoso all ran for City Council Chair 2 in 2001. Lopez and Donoso were the two Latino candidates. The rest of the candidates were white. In the general elections, no candidate received more than 50% of the vote, and Smith and Keating proceeded to a run-off election.

35. Plaintiffs are informed and believe that racially polarized voting occurred in the race for Chair 2. Latino voters gave their backing to Lopez. Non-Latino voters sided with Smith, Keating, and Williams.

36. **Measure L (2001).** Measure L proposed the implementation of district-based elections to replace the City's existing at-large method of election. Under its terms, the City Clerk would have been required to divide the City into six Council Member districts based on population figures from the 2000 Census. All Council Members would have been required to reside in the district they represented.

37. The Measure was rejected by voters, with only 35% supporting it. Plaintiffs are informed and believe that, once again, a racially polarized electorate dictated the results. Latino voters as a bloc supported the Measure. The rest of the electorate uniformly rejected it.

38. **Proposition 187 (1994).** Proposition 187 addressed the issue of undocumented immigration into California, principally from Mexico. The Proposition sought to deny public services such as education, health care and social services to undocumented immigrants. It required all state employees, including doctors, nurses, teachers and police officers to become immigration agents by requiring them to report anyone they merely "suspect" might be here illegally. Proposition 187 implicated race because many believed that it was drafted to attack undocumented immigrants coming into California from Mexico, Indeed, Governor Pete Wilson and other proponents explicitly campaigned for Proposition 187 on the issue of sending a message to the federal government that California was being overwhelmed by the costs associated with undocumented Mexicans. Given that many undocumented immigrants live with their citizen spouses, children, parents or other citizen family members, Proposition 187 clearly affected the rights and privileges of a protected class.

39. Californians passed the proposition by a 59-41% vote. Plaintiffs are informed and believe that racially polarized voting occurred in Modesto for this election. Whereas Latino voters in the City overwhelmingly rejected the Proposition, the rest of the electorate overwhelmingly supported it.

40. **Proposition 209 (1996).** The Proposition sought to eliminate state and local government affirmative action programs in areas of public employment, education and contracting to the extent these programs involved preferential treatment based on race, sex, color, ethnicity, or national origin.

41. Californians passed the racially charged ballot measure. Plaintiffs are informed and believe that racially polarized voting occurred in Modesto in this election. The Latino voters in the City overwhelmingly rejected Prop. 209, while the rest of the electorate supported it.

42. **Proposition 227 (1998).** With certain exceptions, the initiative required that all public school instruction be in English. In general, the proposition provided for "limited English proficient" (LEP) students to be placed in "sheltered immersion" classes in which all classroom instruction would be in English. Students in these classes would eventually move into all-English classes after a year. The program would mainly affect minority students who spoke English as a second language. Campaign literature was directed against Spanish-speaking Latino students and their families. In fact, implementation of Proposition 227 would adversely affect the rights and privileges of this protected class.

43. The Proposition was passed by California voters. Voters in the City overwhelmingly backed the Proposition as well. Plaintiffs are informed and believe that racially polarized voting occurred in Modesto in this election. Latino voters in Modesto as a bloc overwhelmingly voted against it. The rest of the electorate strongly supported the Proposition.

LATINO VOTE DILUTION

44. The at-large method of election and racial polarization has repeatedly caused Latino vote dilution in the City. Where Latinos and the rest of the electorate express different choices on candidates or initiatives in an at-large method of election, non-Latino voters, by virtue of their overall numerical superiority, regularly defeat the preferred choices of Latino voters. Even when Latino voters are unified in their support for one candidate or issue, vote dilution caused by the at-large method of election prevents such votes from being aggregated in a manner that would

successfully lead to the election of the Latino-preferred candidate or issue. The non-Latino voting bloc repeatedly defeats all efforts by Latino citizens to affect City government. The above elections plainly show how the collective will of Latino voters is defeated in City elections.

45. The obstacle posed by the City's at-large method of election, together with racially polarized voting, explains why Latino citizens cannot, and will not, have meaningful participation in government, let alone influence City policies. These factors impair the ability of Latino citizens to elect candidates of their choice or influence the outcome of City elections.

46. Although Latinos are provided an opportunity to vote, their votes are effectively diluted. The City's at-large method of election deprives its Latino citizens the opportunity to effectively participate in government.

OTHER VOTE DILUTION DEVICES EMPLOYED BY THE CITY

47. In the context of the City's at-large method of election and racially polarized electorate, certain election devices employed by the City exacerbate Latino vote dilution. They include a majority-vote requirement and numbered posts.

48. **Majority-Vote Requirement.** Article III, Section 300 of the City Charter provides for a majority-vote requirement for City Council Chair elections. The Charter mandates run-off elections should no candidate receive a majority vote.

49. If an electorate is racially polarized, a majority-vote requirement tends to minimize or cancel out a minority group's votes. The majority-vote requirement can dilute Latino votes in an election where one Latino candidate and several non-Latino candidates run for one council seat. Non-Latino voters will split their votes among the several

non-Latino candidates. Even if the Latino candidate receives more votes than any other non-Latino candidate, so long as the votes received are not enough for a majority win, a run-off election must then be held between the Latino and the top non-Latino candidate. Given the racially polarized voting, non-Latino voters will unite behind the non-Latino candidate, handing the non-Latino candidate the majority vote in the run-off election. In the end, the non-Latino candidate wins even though he or she had fewer votes than the Latino candidate in the first election.

50. **Numbered Posts.** The City Council is divided into six Chairs. Candidates must nut specifically for one of three numbered Chairs in a given election year.

51. Where racially polarized voting exists, requiring candidates to run for a numbered post enhances vote dilution. Numbered posts give the rest of the electorate a better chance to unite against Latino voters. For instance, if the City had no numbered posts, a Latino candidate running for one of the three open Chairs would only need to finish in the top three among *all* candidates in the general election to win a seat. Because the City has numbered Chairs however, a Latino candidate has to finish first for the particular Chair that he or she is seeking to win the seat. Requiring a Latino candidate to finish first, as opposed to finishing in the top three, lessens the chance that a Latino candidate would win a City Council seat, even where Latino voters unite behind the Latino candidate.

FIRST CAUSE OF ACTION

(Violation of California Voting Rights Act of 2001, Cal. Elec. Code § 14025 *et seq.)*

52. Plaintiffs refer to and incorporate paragraphs 1 to 51 as though fully set forth herein.

53. Plaintiffs reside in the City of Modesto. Plaintiffs are Latino and are members of a protected class of

voters under the Act. Plaintiffs are over the age of 18 and are eligible to vote in the City's elections.

54. Modesto is a city situated in the County of Stanislaus and is a political subdivision within the State of California.

55. Modesto employs an at-large method of election, where voters of its entire jurisdiction elect members to its City Council.

56. Racially polarized voting has occurred, and continues to occur, in elections for members of the Modesto City Council and in elections incorporating other electoral choices by voters of the City. As a result, Modesto's at-large method of election is imposed in a manner that impairs the ability of Plaintiffs to elect candidates of their choice or influence the outcome of elections.

57. An actual controversy has arisen and now exists between the parties relating to the legal rights and duties of all Plaintiffs and all Defendants for which all Plaintiffs desire a declaration of rights.

58. Defendants' wrongful conduct has caused and, unless enjoined by this Court, will continue to cause irreparable injury to Plaintiffs.

59. Plaintiffs have no adequate remedy at law for the injuries they currently suffer and will otherwise continue to suffer.

PRAYER FOR RELIEF

Wherefore, Plaintiffs ask this court to:

1. Find that Modesto's current at-large method of election for City Council violates the California Voting Rights Act of 2001;

2. Grant injunctive relief enjoining Defendants from imposing or applying the City's current at-large method of election;

3. Grant injunctive relief mandating Defendants to design and implement district-based elections, as defined by the Act, tailored to remedy Defendants' violation of the Act;

4. Grant Plaintiffs attorneys' fees, costs, and prejudgment interest pursuant to California Elections Code Sec. 14030 and other applicable law; and

5. Grant Plaintiffs such further relief as the Court deems just and proper.

Dated: June 2, 2004 Respectfully submitted,

HELLER EHRMAN WHITE & MCAULIFFE LLP

By /s/ George H. Brown
George H. Brown
Attorneys for Plaintiffs
ENRIQUE SANCHEZ, EMMA PINEDO, AND SALVADOR VERA

[*Names of additional counsel omitted from text*]

APPENDIX H

[Names of counsel omitted from text]

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF STANISLAUS

Filed July 16, 2004

ENRIQUE SANCHEZ, *ET AL.*,
Plaintiffs,

v.

CITY OF MODESTO, *ET AL.*,
Defendants.

ANSWER OF ALL DEFENDANTS TO UNVERIFIED COMPLAINT FOR VIOLATION OF THE CALIFORNIA VOTING RIGHTS ACT OF 2001
(Case No. 347903)

Defendants City of Modesto, Jean Zahr, Jim Ridenour, Bob Dunbar, Janice Keating, Garred Marsh, Will O'Bryant, Denny Jackman, and Brad Hawn (collectively, "Defendants") hereby provide the following answer to the unverified complaint of plaintiffs Enrique Sanchez, Emma Pinedo, and Salvador Vera (collectively, "Plaintiffs").

GENERAL DENIAL

Pursuant to Section 431.30(d) of the California Code of Civil Procedure, Defendants generally and specifically deny each and every allegation, statement, matter, and thing set forth in and alleged in the Complaint, and specifically deny that Defendants, or any of them, engaged in wrongful

conduct and deny that Plaintiffs are entitled to the relief prayed for or any relief whatsoever.

For Defendants' separate and additional affirmative defenses to the causes of action alleged in the Complaint, and without admitting that Defendants have the burden of proof on any of these defenses, Defendants allege as follows:

FIRST AFFIRMATIVE DEFENSE
(Violation of Equal Protection Provisions of the United States And California Constitutions)

1. The California Voting Rights Act of 2001 (California Elections Code §§14025, et seq.) is unconstitutional pursuant to the equal protection provisions of the Fourteenth Amendment to the United States Constitution and of Article 1, §7 to the California Constitution. The California Voting Rights Act of 2001 establishes racial classifications that are not necessary to the attainment of a compelling state interest.

SECOND AFFIRMATIVE DEFENSE
(Failure To State A Cause of Action)

2. Each and every purported cause of action contained in the Complaint fails to allege facts sufficient to state a cause of action against Defendants, or any of them.

THIRD AFFIRMATIVE DEFENSE
(Charter City Authority)

3. City Council elections are a municipal affair and, as a Charter City, Modesto has plenary authority over City Council elections. Modesto's City Charter provides for an at-large City Council election system. In November, 2001, the electorate of the City of Modesto overwhelmingly opposed a ballot measure that would have amended the Modesto City Charter, to create a system of six single-member city council districts. The California Voting Rights

Act of 2001 constitutionally cannot override Modesto's City Charter.

FOURTH AFFIRMATIVE DEFENSE
(Good Faith)

4. Defendants, and each of them, have acted at all times in good faith and in accordance with the Charter of the City of Modesto and all proper laws of the State of California and without intent to deprive Plaintiffs of their rights or to cause other injury.

FIFTH AFFIRMATIVE DEFENSE
(Good Faith)

5. Defendants, and each of them, have acted at all times in good faith and with the reasonable belief that their actions were valid.

SIXTH AFFIRMATIVE DEFENSE
(No Right To Injunctive Or Declaratory Relief)

6. The Complaint and each purported cause of action alleged therein fail to state a basis upon which declaratory or injunctive relief can be granted because defendants have no present duty to perform the acts sought to be compelled and there is no corresponding right in plaintiffs thereto.

PRAYER

WHEREFORE, Defendants pray for judgment that:

1. Plaintiffs take nothing by their Complaint;

2. Judgment be entered in favor of Defendants; and

3. The Court order other and further relief to Defendants as deemed just and proper.

Dated: July 16, 2004 HOWREY SIMON ARNOLD & WHITE LLP

/s/ John E. McDermott
John E. McDermott
Attorneys for All Defendants

APPENDIX I

CHARTER OF THE CITY OF MODESTO CALIFORNIA

* Notes to the Charter.

* Ordaining Clause.

ARTICLE 1. INCORPORATION AND SUCCESSION

ARTICLE II. POWERS OF THE CITY

ARTICLE III. ELECTIONS

ARTICLE IV. FORM OF GOVERNMENT

ARTICLE V. THE ELECTIVE OFFICERS

ARTICLE VI. THE MAYOR

ARTICLE VII. THE COUNCIL

ARTICLE VIII. THE CITY MANAGER

ARTICLE IX. OFFICERS AND EMPLOYEES

ARTICLE X. EXECUTIVE AND ADMINISTRATIVE DEPARTMENTS

ARTICLE XI. APPOINTIVE BOARDS AND COMMISSIONS

ARTICLE XII. PERSONNEL SYSTEM

ARTICLE XIII. FISCAL ADMINISTRATION

ARTICLE XIV. FRANCHISES

ARTICLE XV. SCHOOL SYSTEM

ARTICLE XVI. MISCELLANEOUS

[*The entire text of the Modesto City Charter can be found at*: http://municipalcodes.lexisnexis.com/codes/modesto/]

Notes to the Charter

CHARTER OF THE CITY OF MODESTO
CALIFORNIA

*** Notes to the Charter.**

Submitted to and ratified by the qualified voters of the City of Modesto at a Special Charter Election consolidated with State of California General Election, November 6, 1962

Approved by Assembly Concurrent Resolution No. 4 of the Legislature of the State of California adopted in Assembly on January 8, 1963, and in Senate January 10, 1963

Filed with the Secretary of State January 14, 1963
Effective date of Charter, January 14, 1963
Filed with Recorder of Stanislaus County February 4, 1963
(As amended by elections April 23, 1963, April 20, 1971, November 5, 1974, November 2, 1976, March 8, 1977, November 4, 1980, June 2, 1987, November 7, 1989, November 6, 1990, November 3, 1998, and November 2, 1999)

CHARTER OF THE CITY OF MODESTO
CALIFORNIA

ARTICLE V. THE ELECTIVE OFFICERS

SECTION 501. ELECTED AT LARGE.

The Mayor and Councilmembers shall be elected at the regular municipal election on a general ticket from the City at large.
(As amended November 4, 1980, and November 7, 1989)

APPENDIX J

VARIETY OF RACES AND ETHNICITIES IN THE CITY OF MODESTO

QT-P3: Race and Hispanic or Latino: 2000
Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data
Geographic Area: **Modesto city, California**

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see http://factfinder.census.gov/home/en/datanotes/expsflu.htm

Subject	Number	Percent
RACE		
Total population	188,856	100.0
One race	177,653	94.1
White	131,414	69.6
Black or African American	7,499	4.0
American Indian and Alaska Native	2,335	1.2
American Indian	1,582	0.8
Alaska Native	25	0.0
Both American Indian and Alaska Native	0	0.0
American Indian or Alaska Native, not specified	728	0.4
Asian	11,388	6.0
Asian Indian	2,019	1.1
Chinese	1,174	0.6
Filipino	1,740	0.9
Japanese	374	0.2

Korean	309	0.2
Vietnamese	1,016	0.5
Other Asian category	4,431	2.3
Two or more Asian categories	325	0.2
Native Hawaiian and Other Pacific Islander	951	0.5
Native Hawaiian	116	0.1
Samoan	128	0.1
Guamanian or Chamorro	89	0.0
Other Pacific Islander category	584	0.3
Two or more Native Hawaiian or Other Pacific Islander categories	34	0.0
Some other race	24,066	12.7
Two or more races	11,203	5.9
Two races including Some other race	5,479	2.9
Two races excluding Some other race, and three or more races	5,724	3.0
Two races excluding Some other race	5,062	2.7
Three or more races	662	0.4
HISPANIC OR LATINO		
Total Population	188,856	100.0
Hispanic or Latino (of any race)	48,310	25.6
Mexican	38,819	20.6
Puerto Rican	1,049	0.6
Cuban	153	0.1
Other Hispanic or Latino	8,289	4.4
Not Hispanic or Latino	140,546	74.4

RACE AND HISPANIC OR LATINO		
Total Population	188,856	100.0
One Race	177,653	94.1
Hispanic or Latino	44,228	23.4
Not Hispanic or Latino	133,425	70.6
Two or more races	11,203	5.9
Hispanic or Latino	4,082	2.2
Not Hispanic or Latino	7,121	2.8

Source:
http://factfinder.census.gov/servlet/QTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF1_U_QTP3&-ds_name=DEC_2000_SF1_U&-tree_id=4001&-all_geo_types=N&-_caller=geoselect&-geo_id=04000US06&-geo_id=16000US0648354&-search_results=16000US0648354&-format=&-_lang=en

QT-P3: Race and Hispanic or Latino: 2000
Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data
Geographic Area: **California**

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see http://factfinder.census.gov/home/en/datanotes/expsflu.htm

Subject	Number	Percent
RACE		
Total population	33,871,648	100.0
One race	32,264,002	95.3
White	20,170,059	59.5
Black or African American	2,263,882	6.7
American Indian and Alaska Native	333,346	1.0
American Indian	220,657	0.7
Alaska Native	2,610	0.0
Both American Indian and Alaska Native	110	0.0
American Indian or Alaska Native, not specified	109,969	0.3
Asian	3,697,513	10.9
Asian Indian	314,819	0.9
Chinese	980,642	2.9
Filipino	918,678	2.7
Japanese	288,854	0.9
Korean	345,882	1.0
Vietnamese	447,032	1.3
Other Asian category	314,902	0.9
Two or more Asian categories	86,704	0.3

Native Hawaiian and Other Pacific Islander	116,961	0.3
Native Hawaiian	20,571	0.1
Samoan	37,498	0.1
Guamanian Or Chamorro	20,918	0.1
Other Pacific Islander category	35,502	0.1
Two or more Native Hawaiian or Other Pacific Islander categories	2,472	0.0
Some other race	5,682,241	16.8
Two or more races	1,607,646	4.7
Two races including Some other race	854,761	2.5
Two races excluding Some other race, and three or more races	752,885	2.2
Two races excluding Some other race	658,405	1.9
Three or more races	94,480	0.3
HISPANIC OR LATINO		
Total Population	33,871,648	100.0
Hispanic or Latino (of any race)	10,966,556	32.4
Mexican	8,455,926	25.0
Puerto Rican	140,570	0.4
Cuban	72,286	0.2
Other Hispanic or Latino	2,297,774	6.8
Not Hispanic or Latino	22,905,092	67.6
RACE AND HISPANIC OR LATINO		
Total Population	33,871,648	100.0
One Race	32,264,002	95.3
Hispanic or Latino	10,262,025	30.3

Not Hispanic or Latino	22,001,977	65.0
Two or more races	1,607,646	4.7
Hispanic or Latino	704,531	2.1
Not Hispanic or Latino	903,115	2.7

(X) Not applicable
Source: U.S. Census Bureau, Census 2000 Summary File 1, Matrices P3, P4, PCT4, PCT5, PCT8, and PCT11.

Source:
http://factfinder.census.gov/servlet/QTTable?_bm=y&-state=qt&-context=qt&-qr_name=DEC_2000_SF1_U_QTP3&-ds_name=DEC_2000_SF1_U&-tree_id=4001&-all_geo_types=N&-_caller=geoselect&-geo_id=04000US06&-geo_id=16000US0648354&-search_results=16000US0648354&-format=&-_lang=en

PCT1. AMERICAN INDIAN AND ALASKAN NATIVE ALONE WITH ONE TRIBE REPORTED FOR SELECTED TRIBES [47] - Universe: People who are American Indian and Alaska Native alone - total tribes tallied for people with one tribe only, and people with no tribe reported

Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see http://factfinder.census.gov/home/en/datanotes/expsflu.htm.

	California	**Modesto city, California**
Total tribes tallied:	324,938	2,266
American Indian tribes, specified:	194,070	1,396
Apache	9,907	77
Blackfeet	2,945	19
Cherokee	27,131	338
Cheyenne	609	4
Chickasaw	1,651	32
Chippewa	3,503	30
Choctaw	7,540	154
Colville	203	5
Comanche	1,113	9
Cree	331	0
Creek	2,082	34
Crow	294	
Delaware	576	
Houma	75	
Iroquois	2,201	
Kiowa	394	
Latin American Indians	41,225	217
Lumbee	480	
Menominee	152	

Navajo	8,034	
Osage	835	
Ottawa	331	
Paiute	3,243	
Pima	999	
Potawatomi	1,355	
Pueblo	4,341	
Puget Sound Salish	325	
Seminole	756	
Shoshone	1,074	
Sioux	5,588	
Tohono O'Odham	1,143	
Ute	397	
Yakama	194	
Yaqui	3,801	
Yuman	2,127	
All other tribes	57,115	171
American Indian tribes, not specified	18,321	117
Alaska Native tribes, specified:	2,337	
Alaskan Athabascan	315	
Aleut	527	
Eskimo	656	
Tlingit-Haida	751	
All other tribes	88	
Alaska Native tribes, not specified	241	
American Indian or Alaska Native tribes, not specified	109,969	728

U.S. Census Bureau
Census 2000

Source:
http://factfinder.census.gov/servlet/DTTable?_bm=y&-state=dt&-context=dt&-ds_name=DEC_2000_SF1_U_mt&-name=DEC_2000_SF1_U_PCT001&-tree_id=4001&-all_geo_types=N&-_caller=geoselect&-

geo_id=04000US06&-geo_id=16000US0648354&-
search_results=16000US0648354&-format=&-_lang=en

PCT5. ASIAN ALONE WITH ONE ASIAN CATEGORY FOR SELECTED GROUPS [19] - Universe: Total Asian categories tallied for people with one Asian category only and people with no specific Asian category reported

Data Set: Census 2000 summary File 1 (SF 1) 100-Percent Data

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see http://factfinder.census.gov/home/en/datanotes/expsflu.htm.

	California	**Modesto city, California**
Total:	3,610,809	11,063
Asian Indian	314,819	2,019
Bangladeshi	3,044	0
Cambodian	70,232	2,429
Chinese, except Taiwanese	918,325	1,156
Filipino	918,678	1,740
Hmong	65,095	483
Indonesian	17,755	20
Japanese	288,854	374
Korean	345,882	309
Laotian	55,456	1,185
Malaysian	1,948	0
Pakistani	20,093	38
Sri Lankan	5,775	3
Taiwanese	62,317	18
Thai	36,525	43
Vietnamese	447,032	1,016
Other Asian	7,581	8
Other Asian, not specified	31,398	222

U.S. Census Bureau
Census 2000

Source:
http://factfinder.census.gov/servlet/DTTable?_bm=y&-state=dt&-context=dt&-ds_name=DEC_2000_SF1_U&-CONTEXT=dt&-mt_name=DEC_2000_SF1_U_PCT005&mt_name_DEC_2000_SF1_U_PCT008&-mt_name=DEC_2000_SF_U_PCT011&-tree_id=4001&-redoLog=true&-all_geo_types=N&-geo_id=04000US06&-geo_id=16000US0648354&-search_results=16000US0648354&-format=&-_lang=en

PCT8. NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER ALONE WITH ONE NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER CATEGORY FOR SELECTED GROUPS [14] -
Universe: Total Native Hawaiian and Other Pacific Islander categories tallied for people with one Native Hawaiian and Other Pacific Islander category only and people with no specific Native Hawaiian and Other Pacific Islander category reported

Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see http://factfinder.census.gov/home/en/datanotes/expsflu.htm

	California	**Modesto city, California**
Total:	114,489	917
Polynesian:	71,656	250
Native Hawaiian	20,571	116
Samoan	37,498	128
Tongan	12,111	2
Other Polynesian	1,476	4
Micronesian:	22,898	97
Guamanian or Chamorro	20,918	89
Other Micronesian	1,980	8
Melanesian:	7,676	368
Fijian	7,631	368
Other Melanesian	45	0
Other Pacific Islander, not specified	12,259	202
Filler	0	0

U.S. Census Bureau
Census 2000

Source:
http://factfinder.census.gov/servlet/DTTable?_bm=y&-state=dt&-context=dt&-ds_name=DEC_2000_SF1_U&-CONTEXT=dt&-mt_name=DEC_2000_SF1_U_PCT005&mt_name=DEC_2000_SF1_U_PCT008&-mt_name=DEC_2000_SF1_U_PCT011&-tree_id=4001&-redoLog=true&-all_geo_types=N&-geo_id=04000US06&-geo_id=16000US0648354&-search_results=16000US0648354&-format=&-_lang=en

PCT11. HISPANIC OR LATINO BY SPECIFIC ORIGIN [31] - Universe: Total population

Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see http://factfinder.census.gov/home/en/datanotes/expsflu.htm

	California	**Modesto city, California**
Total:	33,871,648	188,856
Not Hispanic or Latino	22,905,092	140,546
Hispanic or Latino:	10,966,556	48,310
Mexican	8,455,926	38,819
Puerto Rican	140,570	1,049
Cuban	72,286	153
Dominican Republic	5,047	22
Central American:	576,330	900
Costa Rican	13,232	24
Guatemalan	143,500	150
Honduran	30,372	48
Nicaraguan	51,336	246
Panamanian	10,688	46
Salvadoran	272,999	279
Other Central American	54,203	107
South American:	161,822	296
Argentinean	23,218	22
Bolivian	6,619	13
Chilean	13,530	37
Colombian	33,275	80
Ecuadorian	18,115	12
Paraguayan	586	10
Peruvian	44,200	60
Uruguayan	1,639	7
Venezuelan	5,511	20

Other South American	15,129	35
Other Hispanic or Latino:	1,554,575	7,071
Spaniard	22,459	111
Spanish	162,214	1,085
Spanish American	10,080	44
All other Hispanic or Latino	1,359,822	5,831

U.S. Census Bureau
Census 2000

Source:
http://factfinder.census.gov/servlet/DTTable?_bm=y&-state=dt&-context=dt&-ds_name=DEC_2000_SF1_U&-CONTEXT=dt&-mt_name=DEC_2000_SF1_U_PCT005&mt_name=DEC_2000_SF1_U_PCT008&-mt_name=DEC_2000_SF1_U_PCT011&-tree_id=4001&-redoLog=true&-all_geo_types=N&-geo_id=04000US06&-geo_id=16000US0648354&-search_results=16000US0648354&-format=&-_lang=en

Technical definitions:

http://factfinder.census.gov/home/en/epss/glossary_a.html

http://factfinder.census.gov/servlet/MetadataBrowserServlet?type=subject&id=RACESF1&dsspName=DEC_2000_SF1&back=update&_lang=en

http://factfinder.census.gov/home/en/epss/race_ethnic.html

http://factfinder.census.gov/servlet/MetadataBrowserServlet?type=subject&id=NQSPANSF1&dsspName=DEC_2000_SF1&back=update&_lang=en

VARIETY OF ANCESTRIES IN THE CITY OF MODESTO

PCT 16: **ANCESTRY (FIRST ANCESTRY REPORTED)**
[111] - Universe: Total population
Data Set: Census 2000 Summary File 3 (SF 3) - Sample Data

NOTE: Data based on a sample except in P3, P4, H3 and H4.
For information on confidentiality protection, sampling error, nonsampling error, and definitions, see
http://factfinder.census.gov/home/en/datanotes/expsf3.htm

	California	**Modesto city, California**
Total:	33,871,648	189,460
First Ancestry reported:	29,029,327	156,491
Acadian/Cajun	2,227	20
Afghan	24,569	23
Albanian	2,920	15
Alsatian	779	6
Arab:	167,807	780
Egyptian	28,952	50
Iraqi	7,130	77
Jordanian	8,592	0
Lebanese	43,085	55
Moroccan	3,795	7
Palestinian	13,542	106
Syrian	15,664	102
Arab/Arabic	33,694	280
Other Arab	13,353	103
Armenian	190,799	300
Assyrian/Chaldean/Syriac	20,795	2,844
Australian	13,472	47
Austrian	50,545	161
Basque	15,674	124
Belgian	16,922	11

Brazilian	16,184	41
British	114,590	621
Bulgarian	6,531	25
Canadian	71,899	272
Carpatho Rusyn	186	0
Celtic	8,726	33
Croatian	28,953	77
Cypriot	427	0
Czech	45,886	214
Czechoslovakian	29,061	167
Danish	129,866	743
Dutch	240,811	2,525
Eastern European	33,785	49
English	1,664,512	11,330
Estonian	2,673	0
European	291,661	1,629
Finnish	38,660	191
French (except Basque)	422,508	2,549
French Canadian	109,895	561
German	2,178,454	14,421
German Russian	1,065	34
Greek	98,912	806
Guyanese	2,894	0
Hungarian	89,959	200
Icelander	4,615	24
Iranian	151,499	226
Irish	1,597,310	9,710
Israeli	22,886	17
Italian	1,155,752	6,672
Latvian	8,034	15
Lithuanian	33,517	42
Luxemburger	1,650	0
Macedonian	1,968	0
Maltese	6,047	58
New Zealander	3,588	26
Northern European	29,834	138
Norwegian	310,652	2,113

Pennsylvania German	5,554	30
Polish	321,965	1,109
Portuguese	254,541	5,091
Romanian	41,786	292
Russian	305,521	460
Scandinavian	42,138	184
Scotch-Irish	295,538	1,725
Scottish	339,943	1,684
Serbian	9,651	53
Slavic	8,084	47
Slovak	15,940	33
Slovene	6,460	18
Soviet Union	257	0
Subsaharan African:	174,197	591
Cape Verdean	2,391	7
Ethiopian	15,724	9
Ghanian	2,335	0
Kenyan	1,776	8
Liberian	1,158	0
Nigerian	15,900	41
Senegalese	340	0
Sierra Leonean	596	0
Somalian	3,528	0
South African	8,940	0
Sudanese	1,194	0
Ugandan	769	0
Zairian	143	0
Zimbabwean	409	0
African	115,407	526
Other Subsaharan African	3,587	0
Swedish	290,379	2,159
Swiss	72,589	675
Turkish	12,080	24
Ukrainian	66,833	464
United States or American	1,140,830	8,806

Welsh	90,751	657
West Indian (excluding Hispanic Groups):	54,800	80
Bahamian	452	0
Barbadian	1,115	0
Belizean	13,970	0
Bermudan	376	0
British West Indian	1,548	0
Dutch West Indian	1,240	49
Haitian	4,867	0
Jamaican	21,158	31
Trinidadian and Tobagonian	4,147	0
U.S. Virgin Islander	512	0
West Indian	5,168	0
Other West Indian	247	0
Yugoslavian	36,222	169
Other groups	15,981,309	77,280
Unclassified or not Reported	4,842,321	32,969

Table PCT16 With Codes (PDF 6KB)
Ancestry Code List (PDF 35 KB)
U.S. Census Bureau
Census 2000

Source:
http://factfinder.census.gov/servlet/DTTable?_bm=y&-state=dt&- context=dt&-ds_name=DEC_2000_SF3_U&-mt_name=DEC_2000_SF3_U_PCT016&-tree_id=403&-redoLog=true&-all_geo_types=N&-_caller=geoselect&-geo_id=04000US06&-geo_id= 16000US0648354&-geo_id=NBSP&-search_results=16000US0648354&-format=&-_lang=en

PCT18. ANCESTRY (TOTAL CATEGORIES TALLIED) FOR PEOPLE WITH ONE OR MORE ANCESTRY CATEGORIES REPORTED [109] - Universe: Total ancestry categories tallied for people with one or more ancestry categories reported

Data Set: Census 2000 Summary File 3 (SF 3) - Sample Data

NOTE: Data based on a sample except in P3, P4, H3 and H4. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see http://factfinder.census.gov/home/en/datanotes/expsf3.htm

	California	Modesto city, California
Total specified ancestries tallied:	35,569,389	197,177
Acadian/Cajun	2,895	20
Afghan	25,112	23
Albanian	3,670	15
Alsatian	1,493	6
Arab:	192,887	872
Egyptian	30,959	72
Iraqi	8,143	106
Jordanian	9,000	0
Lebanese	53,286	66
Moroccan	4,709	7
Palestinian	14,523	106
Syrian	19,553	102
Arab/Arabic	37,737	310
Other Arab	14,977	103
Armenian	204,631	335
Assyrian/Chaldean/Syriac	22,671	2,967
Australian	17,212	68
Austrian	84,959	239
Basque	20,868	124
Belgian	26,820	192

Brazilian	19,210	60
British	140,156	687
Bulgarian	7,845	145
Canadian	95,327	410
Carpatho Rusyn	263	0
Celtic	10,640	33
Croatian	39,071	106
Cypriot	456	0
Czech	77,673	345
Czechoslovakian	41,216	212
Danish	207,030	1,165
Dutch	417,382	4,194
Eastern European	34,421	49
English	2,521,355	15,931
Estonian	3,465	0
European	309,035	1,783
Finnish	56,528	286
French (except Basque)	782,083	4,901
French Canadian	145,370	665
German	3,332,396	21,750
German Russian	1,268	34
Greek	125,284	909
Guyanese	3,173	0
Hungarian	133,988	317
Icelander	6,221	42
Iranian	159,016	264
Irish	2,611,449	16,588
Israeli	24,956	17
Italian	1,450,884	8,422
Latvian	11,000	28
Lithuanian	51,406	88
Luxemburger	2,824	6
Macedonian	2,303	0
Maltese	7,533	80
New Zealander	4,375	26
Northern European	30,542	158
Norwegian	436,128	3,072

Pennsylvania German	8,310	41
Polish	491,325	1,749
Portuguese	330,974	6,477
Romanian	56,789	319
Russian	402,480	604
Scandinavian	58,737	239
Scotch-Irish	410,310	2,332
Scottish	541,890	2,681
Serbian	12,760	53
Slavic	13,470	62
Slovak	24,535	71
Slovene	9,489	18
Soviet Union	280	0
Subsaharan African:	184,921	625
Cape Verdean	2,633	7
Ethiopian	15,867	9
Ghanian	2,400	0
Kenyan	1,818	8
Liberian	1,174	0
Nigerian	16,232	41
Senegalese	356	0
Sierra Leonean	609	0
Somalian	3,569	0
South African	9,658	0
Sudanese	1,245	0
Ugandan	769	0
Zairian	143	0
Zimbabwean	444	0
African	124,080	560
Other Subsaharan African	3,924	0
Swedish	459,897	3,276
Swiss	115,485	1,037
Turkish	15,104	29
Ukrainian	83,125	608
United States or American	1,140,830	8,806

Welsh	188,414	1,293
West Indian (excluding Hispanic Groups):	63,639	92
Bahamian	595	0
Barbadian	1,306	0
Belizean	15,153	0
Bermudan	465	0
British West Indian	1,784	0
Dutch West Indian	2,307	61
Haitian	5,752	0
Jamaican	24,309	31
Trinidadian and Tobagonian	4,631	0
U.S. Virgin Islander	578	0
West Indian	6,489	0
Other West Indian	270	0
Yugoslavian	49,560	262
Other groups	17,000,575	78,869

Table PCT18 With Codes (PDF 6KB)
Ancestry Code List (PDF 35KB)
U.S. Census Bureau
Census 2000

Source:
http://factfinder.census.gov/servlet/DTTable?_bm=y&-state=dt&- context=dt&-ds_name=DEC_2000_SF3_U&-mt_name=DEC_2000_SF3_U_PCT018&-tree_id=403&-all_geo_types=N&-_caller=geoselect&-geo_id=04000US06&-geo_id= 16000US0648354&-search_results=16000US0648354&-format=&-_lang=en

Technical definitions:
http://factfinder.census.gov/home/en/epss/glossary_a.html
http://factfinder.census.gov/servlet/MetadaBrowserServlet?type=subject&id=ANCESTRYSF3&dsspName=DEC_2000_SF3&back=update&_lang=en

LANGUAGES SPOKEN AT HOME IN THE IN THE CITY OF MODESTO

Source:
http://www.census.gov/population/www/socdemo/lang_use.html

Technical definitions:
http://factfinder.census.gov/servlet/MetadataBrowserServlet?type=subject&id=LANGUAGESF3&dsspName=DEC_2000_SF3&back=update&_lang=en

Language Spoken at Home by Residents of Census Tracts Wholly within Modesto, CA: 2000		
Language Spoken at Home for Counties and Tracts in California: 2000 Source: U.S. Census Bureau, Census 2000 Special Tabulation 224 Universe: Population 5 years and over		
[*Columns omitted for this Appendix*]		
Census Tract Code[*]	Language	Number of Speakers
000503	Arabic	85
000905	Arabic	50
000906	Arabic	90
	Arabic Total	225
002003	Cantonese	95
	Cantonese Total	95
000807	Chinese	55
000905	Chinese	50
000912	Chinese	65
	Chinese Total	170

000503	English only	3,560
000801	English only	5,090
000803	English only	2,890
000805	English only	4,560
000806	English only	3,445
000807	English only	2,870
000905	English only	5,010
000906	English only	4,690
000907	English only	2,835
000909	English only	3,545
000910	English only	4,830
000911	English only	3,625
000912	English only	3,370
001001	English only	4,960
001002	English only	2,530
001100	English only	2,875
001200	English only	3,235
001300	English only	4,985
001603	English only	2,595
001604	English only	1,290
0001700	English only	935
0001800	English only	1,600
0001900	English only	4,170
0002003	English only	4,925
0002004	English only	3,890
	English Total	88,310
000801	French	25
000910	French	30
	French Total	55
000801	German	30
000909	German	20
001001	German	35
001200	German	35
001300	German	35
002003	German	35
002004	German	15
	German Total	205

000910	Greek	50
	Greek Total	50
000803	Hindi	60
000805	Hindi	115
000806	Hindi	60
000909	Hindi	25
000910	Hindi	180
002003	Hindi	465
002004	Hindi	230
	Hindi Total	1,135
001001	Italian	85
001603	Italian	20
	Italian Total	105
001604	Laotian	115
001700	Laotian	140
002003	Laotian	105
002004	Laotian	175
	Laotian Total	535
000803	Mon-Khmer, Cambodian	180
000805	Mon-Khmer, Cambodian	125
001604	Mon-Khmer, Cambodian	280
002003	Mon-Khmer, Cambodian	105
	Mon-Khmer, Cambodian Total	690
000503	Panjabi	50
002003	Panjabi	265
	Panjabi Total	315
000503	Persian	35
	Persian Total	35
000801	Portuguese	40
000805	Portuguese	35
000909	Portuguese	40
000910	Portuguese	60
000912	Portuguese	50
001001	Portuguese	30
001200	Portuguese	20
001900	Portuguese	65

002003	Portuguese	45
002004	Portuguese	35
	Portuguese Total	420
000906	Romanian	60
	Romanian Total	60
000503	Spanish	530
000801	Spanish	480
000803	Spanish	1,165
000805	Spanish	625
000806	Spanish	360
000807	Spanish	440
000905	Spanish	410
000906	Spanish	570
000907	Spanish	140
000909	Spanish	415
000910	Spanish	925
000911	Spanish	375
000912	Spanish	470
001001	Spanish	550
001002	Spanish	325
001100	Spanish	495
001200	Spanish	285
001300	Spanish	545
001603	Spanish	2,425
001604	Spanish	1,715
001700	Spanish	1,275
001800	Spanish	370
001900	Spanish	795
002003	Spanish	1,390
002004	Spanish	1,100
	Spanish Total	18,175
000503	Syriac	145
000801	Syriac	70
000905	Syriac	95
000906	Syriac	70
000909	Syriac	40
000911	Syriac	270

000912	Syriac	185
001001	Syriac	75
001002	Syriac	115
002003	Syriac	390
002004	Syriac	190
	Syriac Total	1,645
000503	Tagalog	80
000905	Tagalog	30
000906	Tagalog	50
000911	Tagalog	60
000912	Tagalog	120
	Tagalog Total	340
000912	Ukrainian	115

[* *All census tracts are in Stanislaus County*]

APPENDIX K

LEGISLATIVE INTENT SERVICE
(800) 666-1917

SENATE COMMITTEE ON ELECTIONS AND REAPPORTIONMENT
Senator Don Perata, Chair

BILL NO: SB 976 HEARING DATE: 5/2/01
AUTHOR: POLANCO ANALYSIS BY: Darren Chesin
AMENDED: AS TO BE AMENDED
FISCAL: NO

SUBJECT:

At large and district elections: rights of voters

BACKGROUND:

Existing law provides that the governing boards of local political jurisdictions (i.e., cities, counties, and school or other districts) are generally elected by all of the voters of the political subdivision (at-large) or from districts formed within the political subdivision (district-based) or some combination thereof.

Existing law generally permits the voters of the entire local political jurisdiction to determine via ballot measure whether the governing board is elected at-large or by districts. The processes for placing one of these measures on the ballot varies according to the type of jurisdiction.

Most cities and schools or other districts in California elect their governing boards using an at-large election system. The exceptions, those that elect by district, tend to be the very large cities and school districts.

One of the most frequently citied reasons for changing from at-large to district elections is the need to overcome a history or pattern of racial inequity. In some instances, election by districts may actually be required by the federal Voting Rights Act. In Gomez v. City of Watsonville (1988), the United States Supreme Court affirmed that the at-large elections of city council members in Watsonville, California had diluted the voting strength of the minority community, and ordered the city to switch to single-member district elections. In Thornburg v. Gingles (1986), the Supreme Court announced three preconditions that a plaintiff first must establish to prove such a claim. The plaintiffs in the Watsonville case were successful in establishing these conditions, which were:

- The minority community was sufficiently concentrated geographically that it was possible to create a district in which the minority could elect its own candidate.
- The minority community was politically cohesive, in that minority voters usually supported minority candidates.
- There was racially polarized voting among the majority community, which usually (but not necessarily always), voted for majority candidates rather than for the minority candidates.

PROPOSED LAW:

This bill would establish criteria in state law through which the validity of local at-large election systems can be challenged in court. Specifically, this bill does all of the following:

(a) Provides that a local political jurisdiction may not employ an at-large method of election if it results in the dilution or the abridgement of the rights of any registered voter who is a member of a minority race, color or language group, by impairing their ability to

elect candidates of their choice or by impairing their ability to influence the outcome of an election.

(b) Provides that a violation of this prohibition is established if it is shown that racially polarized voting occurs in elections for members of the governing body or in elections incorporating other electoral choices by the voters of the same jurisdiction.

(c) Defines "racially polarized voting" as voting in which there is a difference in the choice of candidates or other electoral choices that are preferred by the voters in the protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate.

(d) Specifies the methodology by which racially polarized voting may be established.

(e) Specifies that the fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, but may be a factor in determining an appropriate remedy.

(f) States that proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(g) Delineates other factors that may be introduced as evidence in order to establish a violation.

(h) Authorizes a court to impose appropriate remedies, including district-based elections, and to award a prevailing non-state or non-local government plaintiff party reasonable attorney's fees consistent with specified case law as part of the costs.

COMMENTS:

1. According to the author, this bill addresses the problems associated with block voting, particularly those associated with racial or ethnic groups. This is important for a state like California to address due to its diversity.

2. This bill establishes criteria when met, that would serve to prohibit the use of at-large elections in local jurisdictions. Unlike the preconditions established by the Supreme Court in Thornburg v. Gingles, this bill does not require that the minority community be geographically compact or concentrated. If a minority community is not sufficiently geographically compact to ensure that it can elect one of their members from a district, what is gained by eliminating the at-large election system?

3. Several bills seeking to promote the use of district-based elections over at-large elections have been pursued in the past. Last year, AB 8 (Cardenas) which sought to eliminate the at-large election system within the Los Angeles Community College District, was vetoed by the Governor. In his veto message, the Governor stated that the decision to create single-member trustee areas is best made at the local level, not by the state. AB 172 (Firebaugh) of 1999, which would have prohibited at-large elections for specified K-12 school districts, passed this committee but died in the Senate Committee on Education.

POSITIONS

Sponsor: Joaquin Avila, former President, MALDEF; public interest attorney

Support: None received

Oppose: None received

SB 976

Date of Hearing: April 16, 2002

ASSEMBLY COMMITTEE ON ELECTIONS,
REAPPORTIONMENT AND
CONSTITUTIONAL AMENDMENTS
John Longville, Chair
SB 976 (Polanco) - As Amended: April 9, 2002

SENATE VOTE: 24-10

SUBJECT: Elections: rights of voters.

SUMMARY: Establishes criteria by which local at-large elections may be found to have abridged the rights of certain voters and allows for remedies. Specifically, this bill:

1. Provides that an at-large method of election may not be imposed or applied in a manner that results in the dilution or the abridgement of the rights of voters who are members of a protected class by impairing their ability to elect candidates of their choice or their ability to influence the outcome of an election.

2. Establishes that voter rights have been abridged if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision.

3. Defines "racially polarized voting" as voting in which there is a difference in the choice of candidates or other electoral choices that are preferred by voters in the protected class, and in the choice of candidates and

electoral choices that are preferred by voters in the rest of the electorate.

4. Provides that the existence of racially polarized voting shall be determined from examining results of elections in which candidates are members of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of the protected class. In making such a determination the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class have been elected to the governing body of the political subdivision in question shall be probative.

5. Establishes that methodologies for estimating group voting behavior, as approved in applicable federal cases to enforce the federal Voting Rights Act (VRA), may be used to prove that elections are characterized by racially polarized voting.

6. Specifies that proof of an intent on the part of voters or elected officials to discriminate against a protected class is not required and that the fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting.

7. Specifies that other factors, including the use or electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, are probative but not necessary factors to establish a violation of voting rights.

8. Provides that upon a finding of racially polarized voting the court shall implement appropriate remedies, including the imposition of district-based elections.

9. Provides reasonable attorney fees and litigation expenses for the prevailing plaintiff party in an enforcement action. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

10. Authorizes any voter who is a member of a protected class and who resides in a political subdivision that is accused of a violation of this legislation to file an action in the superior court of the county in which the political subdivision is located.

EXISTING LAW:

1. Provides for political subdivisions that encompass areas of representation within the state. With respect to these areas, public officials are generally elected by all of the voters of the political subdivision (at-large), from districts formed within the political subdivision (district-based), or by some combination thereof.

2. Allows voters of the entire political subdivision to determine via a local initiative whether public officials are elected by divisions or by the entire political subdivision.

FISCAL EFFECT: None

COMMENTS:

1) Purpose of the Bill: According to the author, SB 976 "addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity. SB 976 provides a judicial process and criteria to determine if the problem of block voting can be established. Once the problem is judicially established, the bill provides courts with the authority to fashion appropriate legal remedies for the problem. In California, we face a unique situation where we are all minorities. We need statutes to

ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction: it identifies the problem, gives tools to deal with the problem and provides a solution."

2) Legal History: In Thornburg v. Gingles (1986) 478 U.S. 30, the United States Supreme Court announced three preconditions that a plaintiff first must establish to prove that an election system diluted the voting strength of a protected minority group:

a) The minority community was sufficiently concentrated geographically that it was possible to create a district in which the minority could elect its own candidate.

b) The minority community was politically cohesive, in that minority voters usually supported minority candidates.

c) There was racially polarized voting among the majority community, which usually (but not necessarily always), voted for majority candidates rather than for minority candidates.

In Gomez v. City of Watsonville (1988) 863 F.2d 1407, 1417, cert. denied, 489 US 1080, the United States Supreme Court affirmed that at-large elections of city council members in Watsonville, California had diluted the voting strength of the minority community, and ordered the city to switch to single-member district elections. The plaintiffs in the Watsonville case were successful in establishing the three preconditions created in Gingles.

3) Impact of this Bill: In Gingles, the Supreme Court established three conditions that a plaintiff must meet in order to prove that at-large districts diluted the voting strength of minority communities. This bill requires that only two of those conditions be met, and does not require that a minority community be sufficiently concentrated geographically to create a district in which the minority community could elect its own candidate. As such, this bill

would presumably make it easier to successfully challenge at-large districts. Given that this bill applies to all local districts that elect candidates at-large, the impact of this bill could be significant. If the minority community is not sufficiently geographically compact, it is unclear what benefit would result from eliminating at-large elections.

4) Previous Legislation: AB 8 (Cardenas) of 1999, which sought to eliminate the at-large election system within the Los Angeles Community College District, was vetoed by the Governor. In his veto message, the Governor stated that the decision to create single-member districts was best made at the local level, and not by the state. AB 172 (Firebaugh) of 1999, proposed to prohibit at-large elections for specified K-12 school districts. That bill was approved by this committee, but was amended to an unrelated subject in the Senate Education Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file

Analysis Prepared by: Ethan Jones / E., R. & C.A. / (916) 319-2094

Date of Hearing: June 4, 2002 SB 976

ASSEMBLY COMMITTEE ON JUDICIARY
Ellen M. Corbett, Chair
SB 976 (Polanco) – As Amended: April 9, 2002

SENATE VOTE: 24-10

SUBJECT: DISCRIMINATION: VOTING RIGHTS

KEY ISSUE: SHOULD THE STATE ENACT A VOTING RIGHTS ACT IN ORDER TO PROHIBIT AND REMEDY RACIALLY POLARIZED VOTING THAT ABRIDGES OR DILUTES THE RIGHT TO VOTE IN AT-LARGE ELECTION SYSTEMS?

SYNOPSIS

This bill, which was previously heard by the Elections, Reapportionment and Constitutional Amendments Committee, enacts a state voting rights act comparable to the federal voting rights act in order to address racial block voting in at-large elections. Unlike prior unsuccessful measures concerned with at-large election methods, this bill would not mandate that any political subdivision convert an at-large election system to a single-member district system. Rather, this bill simply prohibits the abridgement or dilution of minority voting rights.

SUMMARY: Prohibits discrimination in at-large election districts. Specifically, this bill:

1) Provides that an at-large method of election may not be employed by a political subdivision of the state in a manner that results in the dilution or the abridgment of the rights of voters who are members of a protected race, color or language class by impairing their ability to elect candidates of their choice or their ability to influence the outcome of an election.

2) Prohibits racially polarized voting, as defined, in elections for members of the governing body of a political subdivision or in elections incorporating other electoral choices by the voters of a political subdivision.

3) Provides that a voter may sue to enforce and a court may remedy violations of the act.

EXISTING LAW:

1) Provides for political subdivisions and the election of public officials by all of the voters (at-large), or from districts formed within the political subdivision (district-based), or by some combination thereof. (Elections Code sections 10505, 10508, and 10523; Government Code Sections 58000-58200.)

2) Allows voters of the entire political subdivision to determine by local initiative whether public officials are elected by divisions or by the entire political subdivision. (Elections Code Section 9102.)

FISCAL EFFECT: As currently in print, this bill is keyed non-fiscal.

COMMENTS: The author states that SB 976 "addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity. SB 976 provides a judicial process and criteria to determine if the problem of block voting can be established. Once the problem is judicially established, the bill provides courts with the authority to fashion appropriate legal remedies for the problem. In California, we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction: it identifies the problem, gives tools to deal with the problem and provides a solution."

This Bill Addresses Racially Polarized Voting if it Impairs the Right of Protected Groups to Influence the Outcome of an Election. This bill establishes a state Voting Rights Act much like the federal Voting Rights Act. Accordingly, it provides protections against the dilution or abridgement of the right to vote by members of the race, color and language groups recognized by the federal act. Restrictive interpretations given to the federal act, however, have put the cart before the horse by requiring that a plaintiff show that the protected class is geographically compact enough to permit the creation of a single-member district in which the protected class could elect its own candidate. This bill would avoid that problem.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the court created three requirements that a plaintiff must establish to prove that an election system diluted the voting strength of a protected minority group: (1) the minority community was politically cohesive, in that minority voters usually supported minority candidates; (2) there was racially polarized voting among the majority community, which usually voted for majority candidates rather than for minority candidates; and (3) the minority community was sufficiently concentrated geographically that it was possible to create a district in which the minority could elect its own candidate. Prior to the *Thornburg* decision, there had been no requirement to show geographical compactness in order to show a violation of the federal voting rights act.

This bill would allow a showing of dilution or abridgement of minority voting rights by showing the first two *Thornburg* requirements without an additional showing of geographical compactness. Under other decisions of the U.S. Supreme Court, the geographical compactness or concentration of the protected class within a political subdivision is a factor in determining whether a district may be drawn to allow that class of voters to elect the candidate of their choice. This bill recognizes that geographical concentration is an appropriate question at the remedy stage. However, geographical

compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system. Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).

This Bill Does Not Mandate the Abolition of At-large Election Systems. Unlike prior legislation regarding at-large methods of election, discussed below, this bill does not mandate that any political subdivision convert at-large districts to single-member districts. Instead, this bill simply prohibits at-large election systems from being used to dilute or abridge the rights of voters in protected classes.

Author's Technical Amendments. To clarify that there is more than one protected class, the author properly wishes to change references to "the protected class" to "a protected class." Similarly, to avoid confusion regarding the definition of racially polarized voting, the author appropriately suggests language referencing the standard under the federal voting rights act. Thus, proposed section 14025(3) on page 3, line 7 *ff*, should read as follows: (e) "Racially polarized voting" means voting in which there is a difference, ***as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)***, in the choice of candidates or other electoral choices that are preferred by voters in the protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act (42 U.S.C. Sec. 1973 *et seq.*) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.

In addition, to correct awkward syntax, the author prudently desires to reword section 14027 as follows: "An at-large method of election may not be imposed or applied in a

manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined in Section 14026."

To clarify the intention of section 14028(b), the author properly proposes that the bill be amended as follows: (b) The occurrence of racially polarized voting shall be determined from examining results of elections in which ***at least one*** candidate***s*** ~~**are**~~ ***is a*** member***s*** of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of the protected class. One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section. ~~***In Elections***~~ In multiseat at-large ***election*** districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of the protected class shall be the basis for the racial polarization analysis.

The author also desires to correct the citation format in section 14030 to read: In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standards established in Serrano v. Priest (1977) 20 Cal.3d 25, ~~**including pages**~~ 48 ~~and~~ -49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

Finally, to clarify the syntax of section 14032, the author wisely suggests that it should read as follows: "Any voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located."

Prior Related Legislation. AB 8 (Cardenas) of 1999 sought to eliminate the at-large election system within the Los Angeles Community College District. That bill was vetoed by the Governor, who stated in his veto message that the decision to create single-member districts was best made at the local level. AB 172 (Firebaugh) of 1999 proposed to prohibit at-large elections for specified K-12 school districts. After passing the Assembly, that bill was amended to an unrelated subject in the Senate.

REGISTERED SUPPORT/OPPOSITION:

Support

ACLU
Joaquin Avila, Esq.
Mexican American Legal Defense and Educational Fund (MALDEF)

Opposition

None on file

Analysis Prepared by: Kevin G. Baker / JUD. /(916) 319-2334

SB 976 Senate Bill - Bill Analysis

BILL ANALYSIS

SB 976

SENATE THIRD READING
SB 976 (Polanco)
As Amended June 11, 2002
Majority vote

SENATE VOTE :24-10

Elections	5-1	Judiciary	8-4
Ayes:	Longville, Cardenas, Steinberg, Kelley, Shelley	Ayes:	Corbett, Dutra, Jackson, Longville, Shelley, Steinberg, Vargas, Wayne
Nays:	Ashburn	Nays:	Harman, Bates, Robert Pacheco, Rod Pacheco

SUMMARY : Establishes criteria by which local at-large elections may be found to have abridged the rights of certain voters and allows for remedies: Specifically, this bill:

1. Provides that an at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class.

2. Establishes that voter rights have been abridged if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision.

3. Defines "racially polarized voting" as voting in which there is a difference in the choice of candidates or other electoral choices that are preferred by voters in the protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate.

4. Provides that the existence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. In making such a determination the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class have been elected to the governing body of the political subdivision in question shall be probative.

5. Establishes that methodologies for estimating group voting behavior, as approved in applicable federal cases to enforce the federal Voting Rights Act (VRA), may be used to prove that elections are characterized by racially polarized voting.

6. Specifies that proof of an intent on the part of voters or elected officials to discriminate against a protected class is not required and that the fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting.

7. Specifies that other factors, including the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, are probative but not necessary factors to establish a violation of voting rights.

8. Provides that upon a finding of racially polarized voting the court shall implement appropriate remedies, including the imposition of district-based elections.

9. Provides reasonable attorney fees and litigation expenses for the prevailing plaintiff party in an enforcement action. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

10. Authorizes any voter who is a member of a protected class and who resides in a political subdivision that is accused of a violation of this legislation to file an action in the superior court of the county in which the political subdivision is located.

EXISTING LAW

1. Provides for political Subdivisions that encompass areas of representation within the state. With respect to these areas, public officials are generally elected by all of the voters of the political subdivision (at-large), from districts formed within the political subdivision (district-based), or by some combination thereof.

2. Allows voters of the entire political subdivision to determine via a local initiative whether public officials are elected by divisions or by the entire political subdivision.

FISCAL EFFECT: None

COMMENTS : According to the author, this bill "addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity. SB 976 provides a judicial process and criteria to determine if the problem of block voting can be established. Once the problem is judicially established, the bill provides courts with the authority to fashion appropriate legal remedies for the problem. In California, we face a unique situation where we

are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction: it identifies the problem, gives tools to deal with the problem and provides a solution."

In Thornburg v. Gingles (1986) 478 U.S. 30, the United States Supreme Court announced three preconditions that a plaintiff first must establish to prove that an election system diluted the voting strength of a protected minority group:

1. The minority community was sufficiently concentrated geographically that it was possible to create a district in which the minority could elect its own candidate.

2. The minority community was politically cohesive, in that minority voters usually supported minority candidates.

3. There was racially polarized voting among the majority community, which usually (but not necessarily always), voted for majority candidates rather than for minority candidates.

In Gomez v. City of Watsonville (1988) 863 F.2d 1407, 1417, cert. denied, 489 US 1080, the United States Supreme Court affirmed that at-large elections of city council members in Watsonville, California had diluted the voting strength of the minority community, and ordered the city to switch to single-member district elections. The plaintiffs in the Watsonville case were successful in establishing the three preconditions created in Gingles.

As noted above, the Supreme Court in Gingles established three conditions that a plaintiff must meet in order to prove that at-large districts diluted the voting strength of minority communities. This bill requires that only two of those conditions be met, and does not require that a minority community be sufficiently concentrated geographically to create a district in which the minority community could elect

its own candidate. As such, this bill would presumably make it easier to successfully challenge at-large districts. Given that this bill applies to all local districts that elect candidates at-large, the impact of this bill could be significant. If the minority community is not sufficiently geographically compact, it is unclear what benefit would result from eliminating at-large elections.

AB 8 (Cardenas) of 1999, which was vetoed, sought to eliminate the at-large election system within the Los Angeles Community College District. In his veto message, the Governor stated that the decision to create single-member districts was best made at the local level, and not by the state. AB 172 (Firebaugh) of 1999, which was vetoed, proposed to prohibit at-large elections for specified K-12 school districts. That bill was approved by the Assembly, but was amended to an unrelated subject in the Senate Education Committee.

Analysis Prepared by: Willie Guerrero/E., R. & C. A. / (916) 319-2094

FN: 0005396

SB 976 (Polanco) **Oppose**
File Item # 59
Senate Floor: 24-10
(NO: All Republicans except; ABS: Haynes, Margett, Monteith, Oller)
Assembly Floor: 47-25
(NO: All Republicans except; ABS: Dickerson, Kelley, Maddox, Maldonado, Wyman)
Vote requirement: 21
Version Date: 6/11/02

Quick Summary

Assembly amendments would permit a member of a protected class to file an action pursuant to this bill under specified circumstances.

Creates a new state Voting Rights Act that goes far beyond current Supreme Court interpretations of the federal Voting Rights law. It will unnecessarily increase voting rights litigation in the state. As currently drafted, this bill is not supportable, however, the author has expressed a desire to work on a bipartisan approach to this issue.

Digest

Enacts the California Voting Rights Act of 2001.

This bill would provide that an at-large method of election may not be imposed or applied in a manner that results in the dilution or abridgment of the right of registered voters who are members of a protected class, as defined, by impairing their ability to elect candidates of their choice or to influence the outcome of an election.

It would provide that a violation of its provisions shall be established if it is shown that racially polarized voting occurs in elections for governing board members of a political

subdivision. It would provide that an intent to discriminate against a protected class is not required to establish a violation of this bill.

It would authorize a court to impose appropriate remedies, including district-based elections, and to award a prevailing nonstate or nonlocal government plaintiff party reasonable attorney's fees and expenses consistent with specified case law as part of the costs.

It would permit a member of a protected class to file an action pursuant to this bill under specified circumstances.

Background

Existing law provides for public officials in political subdivisions are generally elected in at large elections.

Existing law generally permits the voters of the entire political subdivision to decide the manner of election for the entire district.

Most school boards and city councils are elected in at-large elections.

Using the federal Voting Rights Act, several lawsuits have forced local jurisdictions to change their voting procedures. In *Thornburg v. Gingles*, the U.S. Supreme Court set out a three-part test to determine whether at-large elections violated the Voting Rights Act:

1. The minority community was sufficiently concentrated geographically that it was possible to create a district in which the minority could elect its own candidate.
2. The minority community was politically cohesive, in that minority voters usually supported minority candidates.
3. There was racially polarized voting among the majority community, which usually voted for majority candidates rather than for the minority candidates.

Applying the *Gingles* test in *Gomez v. City of Watsonville*, the United States Supreme Court affirmed that the at-large elections for city council violated the Voting Rights Act by diluting Hispanic voting strength. The Court ordered single-member district elections.

Analysis

This bill is unnecessary. The federal Voting Rights Act already protects minorities from harm created by at-large elections.

This bill does not require geographic concentration for a finding of racially polarized voting. If a minority group is not geographically concentrated, how will single-member districts change the results?

It also permits other factors to be considered including use of electoral devices or other voting practices or procedures; the extent to which members of the protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns.

Add those factors to the provisions permitting attorneys' fees and this bill is the full-employment act for voting rights act lawyers and creates a whole new area for trial lawyers to have a field day.

Support & Opposition Received

Support: ACLU, Joaquin Avila, Esq., Mexican American Legal Defense and Educational Fund (MALDEF)

Oppose: None

Senate Republican Office of Policy/Consultant: "*Mike Pettengill/ Cynthia Bryant*

Whip Comments

Last year, Governor Davis hit the nail on the head when he vetoed AB 8 (Cardenas), a similar measure that changed the voting methodology of the LA Community College District Board of Trustees from at-large to 7 trustee districts. In his veto message, the Governor cited local control.

This bill seeks to exceed federal Voting Rights law (both statutory and case law) in a manner which is currently unnecessary to address the real issues of voter access. The language of the bill presents very real problems in the areas of increased litigation and probative findings written into the statutory law, not to mention the overall policy question of creating a body of law separate from the established federal standard.

First, the provisions of the bill which provide that "Any voter of the protected class...may file an action...in the superior court" and which state that "In any action...the court shall allow the prevailing plaintiff party...a reasonable attorney's fee...and litigation expenses including but not limited to, expert witness fees and expenses..." will invite litigation in virtually any conceivable circumstance.

Senate Republican Commentaries

ENROLLED BILL MEMORANDUM TO GOVERNOR

BILL NO: SB 976 AUTHOR: Polanco DATE: 07/01/02
DATE DUE: 07/09/02

SENATE: 24-10 ASSEMBLY: 47-25 CONCURRENCE: 22-13

REVIEWED BY: RECOMMENDATION: Sign ☐ Veto ☐

SUMMARY: This bill enacts the California Voting Rights Act of 2001 and establishes criteria to further ensure that the rights of protected classes of voters are not diluted or polarized by the use of at-large elections.

SPONSOR: Author

SUPPORT: Office of Planning and Research

OPPOSITION: None received.

FISCAL IMPACT: No fiscal impact.

ARGUMENTS IN SUPPORT: This is a progressive voting rights measure that will help ensure that all of California's voters have equal and meaningful voting rights and that at-large elections are not used to dilute or polarize the voting populous. California is now a state of minorities and it is only fitting that our laws reflect this and provide reasonable legal recourse for addressing violations of our voting rights.

ARGUMENTS IN OPPOSITION: No substantive arguments in opposition.

BACKGROUND INFORMATION: This bill enacts the California Voting Rights Act of 2001 that is very similar to the federal Voting Rights Act but with one key exception. In

1985, the Supreme Court imposed three pre-conditions (Gingles factors) for determining if a protected class' voting rights have been/are being diluted. One of the three conditions is that the plaintiff must show that the protected class is geographically compact enough that it would be a majority in a single district (and presumably elect its own candidate.) This bill provides that such a finding is not necessary and that a protected class need only demonstrate the other two Gingle factors – i.e., that the minority community is politically cohesive and usually supports minority candidates and that there is racially polarized voting in the majority community. According to the author, "Block voting, particularly when associated with racial or ethnic groups, is harmful to a state like California due to its diversity. This bill provides a judicial process and criteria to determine if the problem of block voting can be established. Then, the bill provides courts with the authority to fashion appropriate legal remedies for the problem. After the 2000 census, in California, we are facing a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open."

[*Names of Committee Membership and Chairmanships omitted for this Appendix*]
[*Logo omitted for this Appendix*]
CALIFORNIA STATE SENATE
Senate Majority Leader
Senator Richard G. Polanco
Twenty-Second Senatorial District

July 2, 2002

The Honorable Gray Davis
Governor of California
State Capitol, 1st Floor
Sacramento, CA 95814

RE: SENATE BILL 976

Dear Governor Davis:

I am writing to respectfully request your approval of SB 976.

Senate Bill 976 addresses the problem of racial bloc voting in California - a state without a majority racial or ethnic group.

SB 976 is necessary because the federal Voting Rights Act's remedy fails to redress California's problem of racial bloc voting. Federal case law requires that the minority community be geographically compact and sufficiently large to constitute a majority in a hypothetical election district. This geographic compactness standard requires that the minority population in such an election district constitute more than 50 percent of the eligible voter population. If the minority community were at 49 percent, then the federal courts cannot provide a remedy. Such a bright-line test establishes an artificial threshold which often serves to deny minority voting rights in California simply because the minority community is not sufficiently compact.

SB 976 addresses California's problem and lays out criteria and a judicial process to determine if the facts of block voting can be established. The court must use criteria that are well-established in law and in court decisions to establish the existence of the problem. The remedy is not prescribed in the measure but must be fashioned by the court and must be tailored to remedy the violation. Hence, SB 976 focuses the remedy on the problem but is permissive on the remedy that should be used.

Governor, after the 2000 Census, in California we are facing a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction; it identifies the problem, gives tools to deal with the problem and provides a solution.

There is no known opposition to the measure.

I request your approval of the measure and will be happy to provide any additional information you may require.

Sincerely,

/s/ Richard G. Polanco
RICHARD G. POLANCO
Senate Majority Leader
RGP: sma

[Logo omitted for this Appendix]
ACLU

California Legislative Office
[*Names, Address, Telephone and Fax Numbers omitted for this Appendix*]

July 2, 2002

The Honorable Gray Davis
State Capitol
Sacramento, CA 95814

Re: SB 976 (Polanco) -- Support

Dear Governor Davis:

We urge your approval of SB 976, the California State Voting Rights Act of 2001. This act provides an effective tool for minority communities to address the problem of racial bloc voting in the context of at-large elections. The Act permits a local minority community to file an action in a local Superior Court challenging an at-large election system that has a discriminatory effect on minority voting strength. The Act does not mandate the elimination of at-large election; rather, the Act permits a local minority community to prove the existence of racial bloc voting in accordance with well-established case law. Once a violation is established, the Superior Court can implement an appropriate remedy to provide the minority community with greater access to the political process.

Given the demographic changes occurring in California, it is important that the governing boards of local government be reflective of the communities they serve. This Act provides an opportunity to create a political leadership that is both diverse and responsive to the ever increasing demands of our local communities.

For these reasons we urge your approval of the California Voting Rights Act of 2001.

Sincerely,
/s/ Francisco Lobaco
FRANCISCO LOBACO
Legislative Director

/s/ Valerie Small Navarro
VALERIE SMALL NAVARRO
Legislative Advocate

cc: The Honorable Richard Polanco
*[*Names of ACLU offices, addresses, telephone and facsimile numbers omitted for this Appendix*]*

[*Logo Omitted for this Appendix*]

GOVERNOR'S OFFICE OF PLANNING AND RESEARCH

ENROLLED BILL REPORT

CONFIDENTIAL-Government Code §6254(I)		
Department:/Board Office of Planning and Research	Bill Number/Author: SB 976/Polanco LAV: 6/11/02	
Sponsor: Author ☐ Admin Sponsored Proposal No.	Related Bills: None	Chaptering Order (if known) ☐ Attachment
Subject: Elections; rights of voters		

SUMMARY

SB 976 would enact the California Voting Rights Act of 2001 and establish criteria to further ensure that the rights of protected classes of voters are not diluted or polarized by the use of at-large elections.

PURPOSE OF THE BILL

According to the author, "Block voting, particularly when associated with racial or ethnic groups, is harmful to a state like California due to its diversity. SB 976 provides a judicial process and criteria to determine if the problem of block voting can be established. Then, the bill provides courts with the authority to fashion appropriate legal remedies for the problem.

After the 2000 census, in California, we are facing a unique situation where we are all minorities. We need

statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move in that direction, it identifies the problem and gives us tools to deal with the problem, and provides a solution."

RECOMMENDATION AND SUPPORTING ARGUMENTS

SIGN: This is a progressive Voting rights measure that will help ensure that all of California's voters have equal and meaningful voting rights and that at-large elections are not used to dilute or polarize the voting populous. California is now a state of minorities and it is only fitting that our laws reflect this and provide reasonable legal recourse for addressing violations of our voting rights -- SB 976 would do this.

Departments That May Be Affected None	
☐ New/Increased Fee ☐ Governor's Appointment ☐ Legislative Appointment ☐ State Mandate ☐ Urgency Clause	
OPR Position XX Sign ☐ Veto ☐ Defer to:	/s/ Tal Finney 7/1/02
Legislative Director Date Tara Mesick	OPP Director Date Tal Finney

BACKGROUND/EXISTING LAW

Federal: The United States Voting Rights Act (Act) was enacted in 1965 to help put an end to discriminatory election practices (such as literacy tests) and the total resistance of some states in enforcing the 15th

Amendment of the U.S. Constitution. Among its many qualities and protections, Section 2 of the Act holds that a state or political subdivision cannot impose any procedures or practices upon a voter that will abridge or deny that person the right to vote because of their race, color, or language ("protected class"). (42 USC 1973(a))

Section 2 of the Act was expanded in 1982 to address 14th Amendment issues and provided that an individual's rights would be deemed violated, "based on the totality of circumstances", if it is shown that the election/political processes were not equally open or available to members of a protected class. (42 USC 1973(b))

The "totality of circumstances" test consists of seven factors that the courts may consider when determining a Section 2 violation – i.e., the extent of discrimination in that state/subdivision/district; the extent of facially polarized voting in that state/subdivision/district; the extent of racial slurs in campaigns, etc. These factors were put forward in a report by the Senate Judiciary Committee when amending Section 2 as a guide to some of the variables that should/could be considered when weighing these cases -- it was intended that these factors be illustrative, not exhaustive, and that other factors may also be relevant depending upon the claim and the case facts.

Prior to the 1982 amendments, the court's standard for proving a violation under the Act required the plaintiff to demonstrate that the activity had a discriminatory dilutive effect and that the responsible officials had done this intentionally. Congress disagreed with this logic, and according to the sponsor (Senator Dole), the new subsection would make it unequivocally clear that plaintiffs could pursue a Section 2 violation by showing a discriminatory result ("results standard"), and that intent was not required or even relevant. In other words, did the totality of circumstances result in a protected class being denied equal access in electing representatives?

In 1985, the Supreme Court was presented with a case involving voter dilution litigation under the expanded Section 2. The Court affirmed the "results standard" and the "totality of circumstances" test, but went on to create three new conditions for determining a Section 2 violation. These conditions have become known as the "Gingles factors" and hold that: (1) the minority group must be "sufficiently large and geographically compact enough to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive" (minority voters support minority candidates); and (3) a "bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group." (Thornburg v. Gingles, 1986, 478 U.S. 30)

In 1988, the Ninth Circuit Court of Appeal reversed a District Court decision and ruled that the City of Watsonville's "...at-large system is an impermissible obstacle to the ability of Hispanics to participate effectively in the political process." The case was remanded back to the District Court which was ordered to draw up a plan that would address the violations in their entirety – i.e., the creation of appropriate districts. (Gomez v. City of Watsonville, 1988, 863 F.2d 1407) The significance of this case is that it was the first time in the Ninth Circuit that a protected class was permitted to challenge the process and prevailed.

State: Existing law governs the manner in which political/government subdivisions may be established and local officials elected. Elections are either at-large (all the voters in one subdivision) or by district (the subdivision is divided into districts and people vote by district) or a combination. Specifically,

- The Uniform District Election Law provides that the "principal act" governs whether members of a governing body of a district are elected by divisions or by the district at large. (A "principal act" is the

law creating a particular district, agency, or type of district or agency; if there is no "principal act" then the state's general election laws govern. (Elections Code Section 10503-8) This law stipulates that if there are fewer than 100 voters in a district, the election will be at-large. (Elections Code Section 10523)

- The District Organization Law provides a procedure for the organization, operation and government of districts. (Government Code Section 58000 et seq.)

ANALYSIS

SB 976 would enact the California Voting Rights Act of 2001 and do the following:

- Define "at-large election," "district based election," and political subdivision.
- Define "protected class" as a class of voters who are members of a race, color or language minority group pursuant to the Federal Voting Rights Act.
- Define "racially polarized voting" as voting when there is a "difference" (as defined by case law enforcing the Federal Voting Rights Act) in the choice of candidates or other electoral choices that are preferred by voters in a protected class and in the choice of candidates or other electoral choices preferred by voters in the rest of the electorate. (The methods for estimating group voting behavior (as approved in cases enforcing the Federal Voting Rights Act) may be used to determine whether an election is racially polarized.)
- Provide that an at-large election may not be imposed or applied if it impairs the ability of a protected class to elect candidates of its choice or to influence an election because their rights have been diluted or abridged (racially polarized).

- Provide that racially polarized voting shall be determined by examining the results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices, that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation is the extent to which protected class candidates are elected to the governing body of a subdivision that is under question.

- Stipulate that proof of an intent by the voters or elected officials to discriminate against a protected class is not required to demonstrate racially polarized voting.
  Comments: This is the same as federal law.

- Stipulate that the members of a protected class do NOT have to be geographically compact or concentrated to demonstrate racially polarized voting BUT this may be a factor in determining an appropriate remedy.
  Comments: This is one of the three conditions that the Supreme Court added in 1985 for purposes of demonstrating racially polarized voting.

- Specify that other factors (such as the history of discrimination, the use of electoral devices that enhance racial polarization of at large-elections, the use of racial appeals in political campaigns, etc.) are probative, but not necessary to establish violation of a protected class' voting rights.
  Comments: These factors are among those used in assessing the "totality of circumstances" to establish a results standard in federal cases.

- Provide that if, there is a finding of racially polarized voting, the court shall implement appropriate remedies, including the imposition of

district-based elections that would be tailored to remedy the violation.

- Provide that the court shall allow the prevailing plaintiff with a reasonable attorney's fee and litigation expenses, including expert witness fees and expenses. The prevailing defendant would NOT be entitled to recover any costs unless the court found that the action was without foundation, frivolous or unreasonable.
- Provide that any voter who is a member of a protected class may file an action in the county superior court if they reside in a political subdivision where voting violations under this Act are taking place.

COMMENTS

SB 976 would enact the California Voting Rights Act of 2001 that is very similar to the federal Voting Rights Act but with one key exception. As noted previously, the Supreme Court imposed three pre-conditions (Gingles factors) for determining if a protected class' voting rights have been/are being diluted. One of the three conditions is that the plaintiff must show that the protected class is geographically compact enough that it would be a majority in a single district (and presumably elect its own candidate.)

SB 976 would provide that such a finding is NOT necessary and that a protected class need only demonstrate the other two Gingle factors – i.e., that the minority community is politically cohesive and usually supports minority candidates and that there is racially polarized voting in the majority community.

Seemingly, the central issue here is whether one's voting rights are being abridged or violated, not whether the voters are geographically compact enough that they could elect their own representative if they were in a

single district. To that end, the Assembly Judiciary Committee analysis provides a very effective visual when it refers to the geographic compactness requirement as "... putting the cart before the horse ... this bill recognizes that geographical concentration is an appropriate question at the remedy stage ... and ... puts the voting rights horse back where it sensibly belongs -- in front of the cart (i.e., what type of remedy is appropriate once racially polarized voting has been shown.")

OTHER STATES' INFORMATION

A representative of the ACLU Voting Rights Project Office in Atlanta is not aware of any states enacting a voting rights act such as this nor are two attorneys at the U.S. Department of Justice (Civil Rights Division, Voting Section).

A Westlaw search failed to reveal any states enacting their own voting rights act. Several states refer to the federal Voting Rights Act (42 USC 1973) but do so as reference and requiring compliance.

LEGISLATIVE HISTORY

AB 8 (Cardenas, 1999, vetoed). This bill would have required the Board of Trustees of the Los Angeles Community College District to establish seven trustee areas in the district and require members of the governing board to be, elected by trustee area. Governor Davis vetoed this measure stating that "the decision to create single-member trustee areas is best made at the local level, not by the state. Furthermore, current law allows registered voters residing in the Los Angeles Community College District to petition for the creation of trustee areas." (Note: SB 976 does not mandate district elections.)

FISCAL IMPACT – none to the state

ECONOMIC IMPACT – none to the state

LEGAL IMPACT

SB 976 could have a significant legal impact on the voting rights of protected classes in California for it may help prevent the dilution of their vote and lead to the possible creation of more districts that would be truly representative of the protected classes of voters.

SUPPORT/OPPOSITION

Support:
American Civil Liberties Union
Mexican American Legal Defense and Education Fund
Joaquin Avila, Esq.

Opposition:
None on file

ARGUMENTS
Pro:

- California is now a state of minorities and it is only fitting that our laws reflect this and provide protected classes with reasonable legal recourse to address violations of the voting rights act -- SB 976 would do this.
- SB 976 would make it less onerous for protected classes to challenge the fairness of at-large elections and, if successful, the courts could then provide an appropriate remedy to ensure representation. A more equitable, representative system may encourage more people to participate and vote.
- The American Civil Liberties Union writes: "Statewide, the underrepresentation of minority groups on those (governing) boards has been dismally and consistently low for decades ... where racially polarized voting has led to the exclusion of minority preferred candidates, this

law provides for changes in the electoral system so that it more fairly represents the constituencies within each jurisdiction."

- This bill does not mandate district elections, but does prohibit at-large elections if they are compromising or diluting the voting rights and processes of a protected class,
- There are 58 counties, 476 cities, 1055 school districts and more than 3800 special districts in California – we have been unable to get exact figures, but Joaquin Avila (an attorney who specializes in voting rights/elections law) estimates that approximately 80 percent of these elections are at-large.

Con:

- Among other things, the Senate Republican Policy analysis holds that (1) the bill is unnecessary for the federal Voting Rights Act already protects minorities and (2) "the language of the bill presents very real problems in the areas of increased litigation and probative findings ... not to mention the overall policy question of creating a new body of law separate from the established federal standard."
- It is unreasonable to award attorney fees and litigation expenses to prevailing plaintiffs but NOT to prevailing defendants.

LEGISLATIVE STAFF CONTACT

Saeed Ali, Chief of Staff to Senator Polanco, 445-3456.

OTHER CONTACTS FOR VOTER RIGHTS:

Professor Laughlin McDonald, ACLU Voting Rights Project, 404/523-2721

John Greenbaum and Tamara Hagler, U.S. Dept of Justice, Civil Rights Division, Voting Section, 202/307-3113

Joaquin Avila, Esq. (specializes in voting rights law/redistricting/elections) 310/562-4505

[*Logo omitted for this Appendix*]
NALEO

NALEO EDUCATION FUND empowering Latinos to participate fully in the American political process

[*Names of Board of Directors and Board of Advisors omitted for this Appendix*]

July 3, 2002

The Honorable Gray Davis
Governor
1st Floor, State Capitol
Sacramento, CA 95814

Dear Governor Davis:

On behalf of the National Association of Latino Elected and Appointed Officials (NALEO), I am writing to urge your approval of SB 976, the "California Voting Rights Act of 2001." The Act enhances the ability of Latino and other minority communities to challenge local at-large election systems that dilute their voting strength in a discriminatory manner.

SB 976 does not mandate the elimination of at-large elections; rather, the Act permits a local minority community to prove the existence of racial bloc voting in accordance with well-established case law by filing an action in a local Superior Court. Once a violation is established, the Superior Court can implement an appropriate remedy to provide the minority community with greater access to the political process.

Given the demographic changes in California, it is important that the governing boards of local jurisdictions reflect the communities they serve. Discriminatory election systems diminish the vitality and responsiveness of our state's democracy. By approving the California Voting Rights Act

of 2001, you will help ensure that all California voters have a fair opportunity to have their voices heard in the electoral process.

Sincerely,
/s/Arturo Vargas
Arturo Vargas
Executive Director

cc: The Honorable Richard Polanco

www.naleo.org

*[*NALEO office addresses, telephone and facsimile numbers omitted for this Appendix*]*

[Logo omitted for this Appendix]
SVREP

Southwest Voter Registration Education Project

July 8, 2002

The Honorable Gray Davis
Governor of California
State Capitol, 1st Floor
Sacramento, CA 95814

Dear Governor Davis:

On behalf of the Southwest Voter Registration Education Project, I am writing to urge your approval of SB 976, the California State Voting Rights Act of 2001.

This act provides an effective tool for minority communities to address the problem of racial bloc voting in the context of at-large elections. The Act permits a local minority community to file an action in a local Superior Court challenging an at-large election system that has a discriminatory effect on minority voting strength. The Act does not mandate the elimination of at-large elections; rather, the Act permits a local minority community to prove the existence of racial bloc voting in accordance with well-established case law. Once a violation is established, the Superior Court can implement an appropriate remedy to provide the minority community with greater access to the political process.

Given the demographic changes occurring in California, it is important that the governing boards of local government be reflective of the communities they serve. This Act provides an opportunity to create a political leadership that is both diverse and responsive to the ever-increasing demands of our local communities.

For these reasons we urge your approval of the California Voting Rights Act of 2001.

Sincerely

/s/ Antonio Gonzalez
Antonio Gonzalez
President

cc: Cathryn Rivera
Lynn Schenk
Susan Kennedy

[*Logo omitted for this Appendix*]
Governor Gray Davis

JUL - 9 2002

To Members of the California State Senate:

I am signing SB 976. This measure provides voters with a cause of action to challenge at-large elections when it can be shown that a minority's voting rights have been abridged or diluted. Upon a determination that a violation has occurred, the court shall fashion appropriate remedies, including but not limited to single district elections.

While this legislation is far from perfect, it does provide state courts with the ability to fashion remedies for minorities when their votes are unfairly diluted by the use of at-large election. Given the diverse make up of California voters, this legislation will help to ensure that California's electoral system is fair, open to, and representative of all California voters.

Sincerely,

/s/ GRAY DAVIS

State Capitol - Sacramento, California 95814 · (916) 445-2841

No. 07-88

FILED
SEP 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CITY OF MODESTO, et al.,

Petitioners,

v.

ENRIQUE SANCHEZ, EMMA PINEDO, and SALVADOR VERA,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant review when 1) the state court, interpreting state law, determined that Petitioners' facial challenge to the California Voting Rights Act relied upon an erroneous interpretation of the Act, 2) no court has applied the Act or determined the elements of liability and available remedies, 3) the state court remanded the case to the trial court for a determination of the precise scope of the Act, and 4) an impending vote on a ballot measure could moot this action.

CORPORATE DISCLOSURE STATEMENT

No Respondent is a corporation. There are no corporate relationships to disclose under Supreme Court Rule 29.6.

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INTRODUCTION

The California Voting Rights Act (CVRA) seeks to protect California voters from the improper dilution of their vote. This state law offers a remedy when racially-polarized voting impairs the ability of a group—whether white, African-American, or any other race—to select a candidate of choice in at-large election systems used to elect local officials. The California Legislature concluded that racially-polarized voting in at-large election systems is one specific way in which voters' right to select a candidate of their choice can be improperly impaired.

There is no cause for review of this matter. This is the first case in which the recently enacted CVRA has been invoked. California courts have yet to articulate either the elements of a CVRA cause of action or the remedies available in the event that there is a violation. These issues are presently pending before the trial court with appellate instructions to formulate both the elements and the available remedies. The court of appeal did not need to reach these issues as it rejected Petitioners' facial challenge as a misinterpretation of the CVRA.

Thus, there is no conflict in the law. No other California court has reviewed the statute. No other state has enacted or interpreted a statute similar to the CVRA.

Nor is this a matter of such substantive importance that it warrants review. While Petitioners claim that the CVRA is facially unconstitutional because it creates a "racial classification," this Court has recognized that racially-polarized voting that dilutes one's vote is an injury that may be remedied. Without more, the mere fact that the state Legislature seeks to provide a remedy for racially-polarized voting is not grounds for declaring the CVRA facially unconstitution-

al when its application to specific facts and circumstances is not at issue.

Petitioners' claim that the CVRA threatens thousands of at-large election systems is also not a ground for review. The CVRA regulates local elections that California is constitutionally entitled to regulate. That the California Legislature might decide to curtail, or even eliminate, at-large elections is not of federal constitutional moment. In any case, it is clear from the decision of the court of appeal that the CVRA will be construed in a manner consistent with constitutional precepts. Should the courts stray, there will be sufficient time and basis for review based upon an actual evidentiary record, and not hypothetical facts.

Perhaps the most compelling reason for the Court to deny this petition for *certiorari* is the fact that the voters of the City of Modesto will vote on a ballot measure in November 2007 that, if passed, could result in this case being rendered moot. Petitioners make no mention of the measure that asks voters to decide on what form of election system they prefer. This advisory vote would be followed by a binding vote in February 2008 that, if passed, would result in a district election system. It makes little sense for this Court to grant review of a case that could so easily and quickly be rendered moot.

In short, there is no reason to grant the petition.

STATEMENT OF THE CASE

California Provides Protection Against Voter Impairment in Context of At-large Elections

In 2001, the California Legislature enacted the California Voting Rights Act. It allows at-large election systems to be challenged when they "impair" a protected classes' ability to elect candidates of their choice or the ability of a protected class to influence the outcome of an election. *See* Cal. Elec. Code § 14027.[1]

Upon proof of racially-polarized voting that results in vote dilution, the CVRA requires a court to consider whether invalidation of the challenged at-large election scheme is appropriate. The court then must assess whether the plaintiff has shown that the proposed remedy would be effective—that the remedy would enable the protected class to elect candidates or meaningfully influence the outcome of elections. *See* § 14028(c); App. at 120a-121a.

The specific elements that must be proven to establish liability, the remedies that are available, and the showings that must be made to obtain relief under the CVRA have not yet been decided by California courts. Those issues were not presented by Petitioners' facial challenge. After rejecting Petitioners' facial challenge, the court of appeal remanded for consideration of those issues. App. at 38a-39a.

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[1] Unless otherwise specified all statutory references are to the California Elections Code.

Respondents Rely Upon CVRA Protections in Challenge to City's Election Scheme

In a complaint filed on June 3, 2004, Respondents challenged the at-large election scheme of the City of Modesto pursuant to the CVRA. App. at 60a. They alleged that the City of Modesto's at-large election scheme deprived Respondents and Latinos of their ability to elect candidates of their choice due to the dilutive effect of racially-polarized voting. App. at 60a.

Petitioners Bring a Facial Challenge to the CVRA

Petitioners answered the complaint with a general denial and then sought a dismissal of the action. Petitioners claimed that the CVRA was facially unconstitutional. App. at 25a-28a, 34a-35a.

Petitioners claimed that the CVRA was subject to strict scrutiny because it was a "race-conscious" statute. They alleged that it allowed a race-based remedy without proof or a finding of intentional discrimination. App. at 25a-28a, 34a-35a.

Petitioners also raised a now-abandoned argument that the CVRA violated the Equal Protection Clause because only certain groups had standing to sue for a violation of the CVRA. In fact, the CVRA allows those in any protected class to sue. App. at 28a-31a.

Finally, Petitioner raised other arguments. They claimed that the CVRA burdened the right to vote, that it violated the First Amendment rights of voters, and that it violated California's Constitution because its attorneys' fee provision authorized the gift of public funds. App. at 32a-33a, 35a-38a.

The Court of Appeal Rejects the Facial Challenge and Remands for Consideration of the Elements of Liability and the Available Remedies

The court of appeal rejected Petitioners' facial challenge. App. at 1a. The court found that Petitioners failed to show that the CVRA was unconstitutional in all applications. Consistent with the facial challenge standard, the court concluded that the CVRA could not be invalidated merely because Petitioners could imagine some unconstitutional applications. App. at 22a-23a, 35a-36a.

In reaching this conclusion, the court held that Petitioners were incorrect when they claimed that the CVRA allowed only certain persons to sue. It found that all persons could sue under the CVRA regardless of race. In so holding, it also noted that courts had an obligation to construe a statute so as to avoid a constitutional violation. App. at 28a-31a.

The court also rejected the argument that the CVRA was subject to strict scrutiny because it was "race-conscious." The court found that the CVRA was intended to redress a harm inflicted or imposed due to a person's race or national origin. App. at 24a-28a, 34a.[2]

Finally, the court concluded that the CVRA was not unconstitutional merely because there might be remedies that, if imposed, could be unconstitutional. The Court held that any remedy imposed would be "subject to analysis" under this Court's decisions in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Bush v. Vera*, 517 U.S. 952 (1996). Therefore,

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[2] The Court also rejected those arguments not addressed here by Petitioners, including the arguments that the CVRA burdened voting rights, the First Amendment, and allowed for a gift of public funds. App. at 32a-33a, 35a-38a.

"[w]hether one potential remedy under a statute would be subject to strict scrutiny . . . is not the test for facial invalidity of the statute." App. at 38a.

Having rejected Petitioners' claims, the court remanded the case, noting that there were four questions to be answered in the first instance by the trial court:

- What elements must be proven to establish liability?
- Are there specific remedies that are precluded?
- Is the court precluded from employing an alternative at-large system as a remedy?
- Must any contemplated remedy conform to the United State Supreme Court's vote dilution remedy cases?

The answer to these questions, the court noted, would determine whether the CVRA provided persons "only the same relief that they would have obtained under the [Federal Voting Rights Act]" or whether there was some other remedy that "does not result in unconstitutionally drawn districts under the Supreme Court's rulings." App. at 38a.

The California Supreme Court Declines to Review the Decision of the Court of Appeal

Petitioners sought review by the California Supreme Court. Without comment, the California Supreme Court rejected Petitioners' petition for review.

REASONS TO DENY THE WRIT

1. California courts have not determined the elements of a CVRA violation. Nor have the courts decided what remedies might be available to a plaintiff who establishes a violation of the CVRA.

There is therefore no reason to take the precipitous step of granting review. The effect and scope of the statute have not been determined. The statute involves a matter uniquely of state concern—the manner in which officials for local offices will be elected. This Court has consistently deferred to a state court's interpretation of a state statute. *See infra* Parts I, II.

2. There is no conflict in authority, and Petitioners do not purport to articulate one. There is no conflict in the California courts as to the meaning or application of the CVRA. There is no other state that has promulgated a statute similar to the CVRA. Therefore, there can be no actual, or even brewing, conflict in authority between California and any other state.

There cannot even be a conflict between the CVRA and any federal law as the CVRA has not yet been construed. One of the pending questions to be resolved by the trial court is the proper scope of any relief or remedy under the CVRA. *See infra* Part I.

3. As for the national importance of the issue, the CVRA is an effort by the State of California to regulate local elections. Elections for federal office are not implicated because the CVRA only applies to elections of local officials, such as city council members, and school board members. As such, it addresses uniquely local interests.

Even were the CVRA to gain national interest at some later stage, those concerns are not ripe at this juncture. There is no reason for this Court to interrupt California's regulation of its local elections based upon some unfounded fear that a constitutional violation will result. If such issues arise, they may be addressed in due course. *See infra* Part II.

4. This case might be rendered moot long before a briefing on the merits. The City of Modesto has placed on the ballot a proposal to eliminate the challenged at-large election system. *See infra* Part III.

5. The Petitioner's contention that the CVRA is a potential threat to at-large election schemes creates no basis for review. States are given the authority to govern and regulate the manner of their elections, particularly for local offices. Therefore, California's decision to impose conditions on its at-large election systems—even if it means the elimination of such systems—does not justify the grant of the petition.

Further, should the CVRA result in at-large election systems being set aside, those instances are subject to review by the California courts of appeal and the California Supreme Court. If, following review by both these courts, there remains an issue of constitutional import, this Court can then review any such issue. At that time, the federal constitutional issues, if any, would fairly present themselves for adjudication. *See infra* Parts II, IV.

6. The CVRA is not facially unconstitutional. This Court has acknowledged that at-large election systems that impair the rights of protected classes to vote meaningfully are subject to remedial measures. What those measures are, and the extent of the remedy, may be subject to constitutional review; however, that such measures are available on adequate proof is without question.

Petitioners' claim that the CVRA is of remarkable constitutional importance because it represents an attempt to allow the smallest of groups the opportunity to upset an election and imposes liability before there is some determination that a majority-minority district can be created also does not compel review. The CVRA does not require a court to set aside an at-large system merely upon a finding of liability, as Petitioners suggest. A court must still determine whether there is proof that the ability to elect or to influence the outcome of an election is "impaired." Small groups that cannot show this are unable to obtain a remedy. As for the specific remedy, it must still address the harm within a constitutionally prescribed fashion. *See infra* Part IV.

7. Finally, that race is considered somehow in the CVRA statutory scheme does not render it constitutionally infirm. A statute that seeks to remedy racial discrimination, like Title VII, is not one that is constitutionally suspect. The CVRA is an attempt to remedy a form of discrimination that has been recognized in courts and legislatures across the country: in some circumstances, racially-polarized voting in at-large elections improperly impairs the rights of members of a protected class to vote. The mere mention of race, i.e., that there is some level of "race-consciousness" in the CVRA, also does not render it constitutionally suspect. First, contrary to Petitioners' arguments, the CVRA has nothing in common with laws, that deprive people of the right to marry, that segregate people by race, or that are intended to benefit one group over another. Second, a statutory scheme is not subject to strict scrutiny merely because it is somehow "race-conscious." Legislatures are entitled to enact statutes that, for example, seek to prohibit racial discrimination, without having to satisfy strict scrutiny. Such a

statute neither places a burden nor distributes a benefit based on race. *See infra* Part IV.

For these reasons, Petitioners' petition should be denied.

I. THERE IS NO CONFLICT

Petitioners do not argue that there is a conflict between the CVRA and any other state statute or a conflict among California courts as to the meaning of the CVRA. This stands to reason. The present case represents the first opportunity any court has had to construe the CVRA or a statute like it. Even now, questions remain as to the CVRA's scope and meaning. The case has been remanded to the trial court for consideration of just these issues.

Petitioners assert the CVRA is suspect because Petitioners believe that it allows a court to set-aside an at-large election scheme without proof of a "majority district" as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986). Pet. at 14-19. Even when cast as a conflict issue, this argument does not merit attention.

First, the court of appeal remanded the case expressly so that the trial court could determine whether there must be proof of a "majority district" before relief from an at-large election system may be granted. No conflict exists because on remand the trial court must answer the question:

> Is the court precluded from employing crossover or coalition districts (*i.e.*, districts in which the plaintiffs' protected class does not comprise a majority of voters) as a remedy?

App. at 38a.

Second, neither *Thornburg* nor any other decision of this Court has held that proof of a "majority district" such as that discussed in *Thornburg* is a constitutional requirement that precludes consideration of remedies such as the creation of coalition and crossover districts. *Cf. Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs.*, 906 F.2d 524, 526-27 (11th Cir. 1990) ("Two minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner."); *Badillo v. City of Stockton*, 956 F.2d 884, 886 (9th Cir. 1992) (plaintiffs permitted to show coalition of African-Americans and Hispanics although failed to show cohesion).

As there is no conflict, there is no reason to grant Petitioners' petition.

II. DEFERENCE IS DUE TO A STATE'S REGULATION OF ITS ELECTIONS AND A STATE COURT'S CONSTRUCTION OF ITS STATUTES

A. California's Governance And Regulation Of Its Elections Are Matters Of State, Not Federal, Interest

As the CVRA has yet to be construed in a concrete factual context, review by this Court of what is essentially an interlocutory appeal, is premature at best. Petitioners' argument that at-large election systems are threatened is not a basis for review. *See, e.g.*, Pet. at 6 (claiming the CVRA will "invalidate literally thousands of at-large systems").

Even were California's at-large election systems threatened with imminent demise, the regulation of local elections is a constitutional power entrusted to the states. *See, e.g.*,

Oregon v. Mitchell, 400 U.S. 112, 124-25 (1970) ("[T]he Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections."); *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.").

The state's expansive power is indisputable:

> Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But this does not mean that the State's powers are similarly limited. Quite the opposite is true.

Voinovich v. Quilter, 507 U.S. 146, 156 (1993).

The CVRA concerns a matter of state and local interest. Its impacts—if any—affect the manner by which city council members, school board members, and community college district representatives are elected.

In fact, the CVRA has no importance beyond the state line of California. The CVRA does not presently, or foreseeably, affect the voting process by which national officeholders are elected to office. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (overturning state law placing term limits on Congressional offices).

Given this, the deference owed to a states' authority to regulate its elections dictate that this Court not intervene. App. at 39a.

B. California Courts Should Be Given The Opportunity To Interpret State Statutes

Allowing the California courts to arrive at an interpretation of the CVRA is consistent with this Court's doctrine that a state's interpretation of its statutes is binding on this Court. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986) ("[W]e must abide by the narrowing constructions announced by the Superior Court and approved *sub silentio* by the Supreme Court of Puerto Rico."); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (noting that the Court is bound by the construction given to a statute by the state courts). Therefore, if this Court should decide that review of this matter is appropriate, it should do so only after it has had the benefit of the state courts' interpretation.

III. A BALLOT MEASURE, IF PASSED, WOULD MOOT THIS ACTION

The City of Modesto has placed on the November 2007 ballot a measure that would modify the challenged system by which city council members are elected.[3] If the measure is approved and finalized in a binding vote scheduled for February 2008, it is likely that this case will be rendered moot.

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[3] City of Modesto Council Agenda Report (June 29, 2007), http://www.ci.modesto.ca.us/ccl/agenda/ar/2007/07/ar070710-16.pdf.; Minutes of City Council meeting, City of Modesto, Item 22, Unfinished Business (June 26, 2007), http://centreplaza.com/ccl/minutes/2007/cc070626.asp; Minutes of City Council meeting, City of Modesto, Item 16, Unfinished Business (July 10, 2007), http://www.ci.modesto.ca.us/ccl/minutes/2007/cc070710.asp. These items were last viewed on August 27, 2007.

For this reason, as well, Petitioners' petition should be denied.

IV. THE CVRA IS NOT FACIALLY UNCONSTITUTIONAL

A. At-Large Election Systems That Impair The Ability To Elect May Be Remedied

Petitioners' racial classification argument and their facial challenge ignores the fact that this Court has determined that valid and proper remedies are available for at-large election systems that impair the ability of a protected class to elect a candidate of choice. *See, e.g., Thornburg*, 478 U.S. 30. Racially-polarized voting in at-large elections has consistently been recognized as depriving minorities of their right to vote meaningfully both in California and elsewhere. *Id.* at 47-48 (citing cases and studies); *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988) (finding racially-polarized voting in a California at-large election system).

There may be issues with the remedies that are imposed under the CVRA and, the elements of a CVRA violation. Nonetheless, a statute that seeks to remedy racially-polarized voting that dilutes one's vote in an at-large election system is not subject to constitutional attack based on an argument that it creates a "racial classification" or is somehow "race conscious." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race . . . ."); *see also Parents Involved In Comty. Schools v. Seattle School Dist.*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring) ("race-conscious" statutes are not subject to strict scrutiny when they "do not lead to different treatment based on a classification").

Petitioners' argument is wrong; it depends on the acceptance of the idea that any statute that considers race—even one that seeks to eliminate or prohibit a recognized form of discrimination—is subject to strict scrutiny. Pet. at 6-9 & n. 2. Moreover, in the 42 years since the enactment of the FVRA, no court has ever suggested that a challenge to at-large election systems, when there is proof of racially-polarized voting that dilutes the right to vote, raises the constitutional concerns expressed by Petitioners.

Petitioners' facial challenge fails.

B. The CVRA Does Not Create "Racial Classifications"

Petitioners' argument that the CVRA creates a constitutionally suspect racial classification because "the Act operates *entirely* and *only* on the basis of racial classifications," Pet. at 9 (emphasis in original), *see also* Pet. at 13, ignores the distinction between rules that penalize or benefit a certain race and those that prohibit discrimination.

Whatever else may be said about the CVRA, it does not create or replicate the statutory schemes at work in those cases on which Petitioners rely for their argument: *Loving v. Virginia*, 388 U.S. 1 (1967), *McLaughlin v. Florida*, 379 U.S. 184 (1964), and *Johnson v. California*, 543 U.S. 499 (2005).[4] These cases concern statutes and regulations that

[4] Petitioners take the court of appeal to task because, as Petitioners represent it, the court concluded that strict scrutiny is not appropriate because "all racial groups purportedly may sue under the Act [and therefore the Act] treats all races equally . . . ." Pet. at 9. In fairness, this mischaracterizes the court's holding. The court was forced to address two issues raised by Petitioners, only one of which Petitioners now urge. Petitioners made a standing argument, now abandoned before this

reflect the grossest forms of our segregated past, when persons were deprived of the right to marry and were segregated solely on the basis of race. Neither in operation nor intent does the CVRA come close to mirroring the statutes at issue in those cases.

The CVRA is also not like those statutes at issue in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), *Grutter v. Bollinger*, 539 U.S. 309 (2003), or *Parents Involved in Comty. Schools*, 127 S. Ct. 2738 (2007). It does not seek to distribute a benefit to one class to the detriment of another, whether that is a government contract, *Adarand Constructors*, a spot in a law school class, *Grutter*, or a seat in a local school. *Parents Involved in Comty. Schools*. This is not an instance "when the government distributes burdens or benefits on the basis of individual racial classifications . . . ." *Id.* at 2751-52 (citing *Adarand Constructors, Inc.*, *Grutter*, and *Johnson*).

Instead, this is an instance in which the California Legislature is seeking to remedy a recognized harm in a manner that does not benefit or burden any race or class. *See supra* Part IV, A; *see also* App. at 25a-26a, 35a.

Court, claiming that the CVRA was subject to strict scrutiny because not all were entitled to sue. The court rejected this argument, holding—as Petitioners presently note—that since all can sue there was no basis for strict scrutiny. App. at 28a. Separately, Petitioners raised the claim that any race-based statute was subject to strict scrutiny. As to *this* argument, the court concluded the CVRA seeks to redress "a race-based harm, vote dilution." App. at 26a.

C. The Remedies That Petitioner Speculates Might Be Imposed Do Not Justify Review

Petitioners suggest that the aim and result of the CVRA will be "racial balancing." *See, e.g.*, Pet. at 21. Petitioners claim that this is inevitable because the CVRA does not require proof of a majority district for liability to be established. Pet. at 13-19. Thus, according to Petitioners, it is possible for a single Hispanic to upset an at-large system "notwithstanding the obvious inability to create any remedy or a winnable district with only one Hispanic voter." Pet. at 19.

Speculation that the California courts will adopt Petitioners' extreme view on how the statute should be construed does not justify this Court's intervention. Whether the CVRA will allow such a remedy has not yet been determined, or even hinted at, except that the court of appeal has affirmatively stated that any remedy must conform to constitutional precepts. *See supra* Parts I, II.

There is, however, more reason than this to reject Petitioners' extreme claim. The CVRA dispenses with the necessity of showing the existence of geographical compactness for the purposes of liability. But it does not render irrelevant considerations of the ability of a protected class to elect or influence an election. Such considerations are part of the inquiry because a CVRA violation is only established when the ability to elect or influence the outcome of an election is impaired. § 14027; *see also* § 14029 (authorizing courts "to implement the appropriate remedies . . . that are tailored to remedy the violation").

To be sure, the CVRA appears to allow for remedies such as crossover or coalition districts, which is one of

the reasons it does not require proof of a majority-minority district as an element of liability. App. at 10a. Whether such remedies are actually available and whether they will pass constitutional scrutiny as a remedy in a specific case has not been, and cannot be, decided on the record before this Court. This is one of the issues that the court of appeal asked the trial court to grapple with on remand. App. at 38a-39a. Any constitutional challenge that may arise from such remedies should await their application.

V. THE FACT THAT PETITIONERS CAN HYPOTHESIZE A CONSTITUTIONAL CONCERN DOES NOT WARRANT GRANTING THEIR PETITION

Petitioners end their petition by claiming that the court of appeal erred when it concluded that their facial challenge fails because "the statute can be saved facially by narrower judicial application ...." Pet. at 23. According to Petitioners, there is no "escape from the presumption of facial unconstitutionality ... where there is no nexus between justification and classification." Pet. at 23.

This argument does not merit review. First, Petitioners do not dispute that, as found by the state court of appeal, a facial challenge under *United States v. Salerno*, 481 U.S. 739 (1987), is only successful when there is no imaginable set of circumstances under which a statute would be constitutional. App. at 22a-23a.

Second, Petitioners' real argument is that the CVRA is only capable of the extreme interpretation they proffer. The court of appeal found otherwise and its interpretation is binding. *See supra* Part II, B. Moreover, as the CVRA is still

wants interpretation and is sitting in the trial court awaiting that interpretation, Petitioners' assertion lacks merit.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

CITY OF MODESTO, *ET AL.*,
Petitioners,

v.

ENRIQUE SANCHEZ, EMMA PINEDO, AND SALVADOR VERA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

The Petition seeks reversal of the decision below applying rational basis review, instead of the constitutionally required strict scrutiny review, to the racial classifications that determine liability under the California Voting Rights Act ("Act"). Specifically, California Elections Code Section 14028(a) mandates invalidation of at-large elections entirely and solely on the basis of race, i.e., racially polarized voting, without requiring proof of racial injury before imposing liability. This statute, which unfairly threatens thousands of at-large election systems in California that cause no impairment of voting rights, is facially unconstitutional.

Respondents' Brief in Opposition barely responds to the pivotal standard of review issue or to the authorities cited in the Petition mandating strict scrutiny review of the Act's express racial classifications. Respondents merely repeat the erroneous holding of the decision below that the Act is a race-conscious statute that is race neutral and applies to all races equally, thereby deserving only rational basis review. Yet, as noted in the Petition (pp. 5-9), this Court plainly has rejected that rationale in analyzing express racial classifications like those here. Respondents raise ripeness, deference, the propriety of facial review and mootness but the decision below, in failing to apply strict scrutiny to the Act's racial classifications, is unquestionably wrong, inescapably conflicts with this Court's settled jurisprudence and warrants plenary review and reversal.

Respondents also attempt to sidestep the Act's glaring facial constitutional defect, i.e., it mandates invalidation of at-large systems solely on the basis of race without proof of racial injury. They assert that courts applying the Act "must" determine that an effective remedy exists after liability has been determined. Opp., p. 3. Yet it is precisely because remedies are not considered before liability is imposed (as is

true under federal law) that the Act is facially invalid as a matter of settled constitutional law. Pet., p. 15. Respondents do not appreciate that invalidation of the at-large system solely on the basis of race is itself race-based governmental action, one imposed unconstitutionally without proof of racial injury. The Act in short cannot be fairly characterized as an antidiscrimination statute. Indeed, it was enacted for racial balancing objectives. Pet., p. 21.

At bottom, the facial constitutional issue presented is whether racially polarized voting without proof of a majority district constitutes vote dilution or discrimination, i.e., whether "influence" claims are viable. Pet., pp. 14-19. This is an issue of national importance frequently asserted in federal voting rights cases that compels strict scrutiny review. The Legislature failed to make the constitutionally required findings on that issue and the decision below erroneously avoided that issue by applying an improper rational basis standard of review. The Act cannot survive strict scrutiny review.

The Petition should be granted.

I. THE OPINION BELOW IS DIRECTLY IN CONFLICT WITH THIS COURT'S CASES

Respondents erroneously assert that "there is no conflict in the law" (Opp., p. 1) and that Petitioners do not purport to articulate any conflict in authority to warrant review of the Act (Opp., p. 7). Nothing could be further from the truth. As the Petition makes clear (pp. 9-12), the failure of the Court of Appeal to apply strict scrutiny to the racial classifications that determine liability under the Act is directly contrary to this Court's Fourteenth Amendment strict scrutiny racial classification cases.

On its face, the Act invalidates at-large elections entirely and only on the basis of racially polarized voting, an express racial classification that requires strict scrutiny review. The opinion below, in applying deferential rational basis review to Petitioners' facial challenge to the Act, is contrary to the Fourteenth Amendment. It does not matter that no other California court has addressed the Act or that no other state has enacted a similar statute. What matters is that the opinion below, which will govern application of the Act to several thousand public entities in California that elect at-large, is in conflict with this Court's cases.

Respondents' treatment of the Act's racial classifications is perfunctory, largely nonresponsive to the Petition and mischaracterizes important cases of this Court. In particular, respondents confuse race-conscious statutes with statutes containing express racial classifications. Respondents (Oppos., p. 14) cite *Bush v. Vera*, 517 U.S. 952, 958 (1996) for the proposition that strict scrutiny does not apply simply because redistricting is performed with consciousness of race. *Bush*, however, involved redistricting legislation that did not even mention race and thus was not a facial challenge to an express racial classification as *Bush* itself makes clear. *Id.* Nonetheless, the Court, in reviewing the Legislature's actions and motivations in *Bush*, made clear that, while race could be considered as one of many factors, if race were the sole or predominant criterion to which all other relevant factors were subordinated, strict scrutiny would apply. *Id.* at 959. In this case, the Act contains explicit racial classifications that require invalidation of at-large elections solely on the basis of race without regard to any other factors. Pet., pp. 6-9. Strict scrutiny is thus mandated by this Court's precedents. Labeling the Act "race

conscious" provides no escape from that conclusion.[1] Indeed, this Court applied strict scrutiny to the University of Michigan's "race-conscious" admissions policy, which explicitly authorized consideration of race as one of many factors. *Grutter v. Bollinger*, 539 U.S. 306, 341-42 (2003). *See also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S.__, 127 S. Ct. 2738, 2753-54 (2007) and *id.* at 2792, 2794-96 (Kennedy J., concurring) (comparing race-conscious measures that do not rely on express racial classifications).

Respondents erroneously argue that strict scrutiny does not apply because the Act applies to all races and does not burden or benefit one race over another. This Court's cases squarely reject that contention. Pet., pp. 9-10. Respondents completely fail to address or distinguish this Court's repeated holdings that neutral racial classifications that apply to all races equally nonetheless receive strict scrutiny. *Id.* Respondents fail to appreciate that racial classifications inherently are harmful. *Id.*, p. 9. The Act in any event distributes burdens and benefits solely on account of race. *Id.*, p. 8.

Respondents never respond directly to the Act's primary constitutional defect, i.e., it is facially unconstitutional because it mandates liability solely on the basis of racially polarized voting, without requiring proof of racial injury or minority electoral defeat. Pet., pp. 13-23.

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[1] Curiously, respondents suggest that it was Petitioners who asserted that the Act here is "race-conscious." Opp., p. 4. That assertion is factually untrue and respondents provide no citation to the record to support it. It was respondents who in the courts below argued that the Act was merely "race-conscious" and should receive rational basis review for that reason. Petitioners then and now have argued consistently that the Act is not merely race-conscious but an express racial classification.

Respondents assert that the Act "offers a remedy when racially polarized voting impairs" a group's ability to elect (Opp., p. 1) but quite plainly the statute does not require proof of anything more than racially polarized voting to establish liability, which by itself does not demonstrate vote dilution or racial injury, as respondents themselves concede. *See* Opp., p. 9 ("in some circumstances, racially-polarized voting in at-large elections improperly impairs the rights of members of a protected class to vote") (emphasis added).

The decision below nowhere holds that petitioners misinterpreted it (Opp., p. 1) and respondents do not provide any citation to support that assertion. It is Section 14028(a) that is extreme, not petitioners' interpretation of it. Opp., p. 18.

Respondents assert that the Legislature concluded that racially polarized voting is one way voting rights can be impaired (Opp., p. 1) but the Legislature failed to provide the constitutionally required findings to justify that conclusion in all circumstances, plainly rendering the Act facially unconstitutional. *See* Pet., pp. 19-23. Respondents assert that the Act seeks to remedy a "recognized harm," and to redress a "race-based harm, vote dilution" (Opp., p. 16) but liability without proof of a majority district or minority electoral defeat is not a recognized harm or vote dilution or racial injury. Pet., pp. 13-19. Fatally, the Legislature made no findings to establish that racially polarized voting in the absence of a majority district causes racial injury that could be regarded as compelling for strict scrutiny purposes. Pet., pp. 19-23.

This is not a case about remedies but about liability. Remedies considered after liability is imposed (i.e., after the at-large system has been condemned) cannot cure the Act's constitutional infirmity. The Act mandates invalidation of at-

large election systems solely on the basis of racially polarized voting. Because remedies are not considered before liability is imposed, the Act cannot credibly be considered an antidiscrimination measure and the decision below errs in so characterizing it. Pet., p. 11. It is precisely what the Legislature intended, and the legislature history makes clear it is. It is racial balancing legislation. Pet., p. 21. Respondents invoke other civil rights laws but these laws do not impose liability solely on the basis of race without proof of racial injury.

II. THIS CASE IS RIPE FOR REVIEW

Respondents seek to avoid review by arguing that California courts have not construed the Act yet or determined the elements of liability. The Act, however, plainly mandates the invalidation of at-large election systems on proof of racially polarized voting alone. Elections Code Section 14028(a). The opinion below does not invalidate or modify that statutory provision nor may the trial court on remand do so. Quite to the contrary, the opinion below retains the Act's challenged racial classifications. The facial challenge before the Court is squarely and timely presented. This is not an interlocutory appeal, nor does the remand order provide any basis to defer needed review of the Act's facial constitutionality.

In any event, the opinion below erroneously applying rational basis review to the Act's racial classifications is ripe for review, and respondents do not suggest otherwise. More importantly, the trial court on remand necessarily will carry out the Court of Appeal's instructions based on its erroneous rational basis standard. The Act's racial classifications, however, are inherently suspect, presumptively unconstitutional and subject to immediate strict scrutiny review. Pet., p. 7. Respondents are entitled to have

California justify its racial classifications under strict scrutiny before they are applied. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

III. STATE RACIAL CLASSIFICATIONS RECEIVE NO DEFERENCE IN STRICT SCRUTINY REVIEW

Respondents suggest that deference is due to a state's regulation of elections and its construction of statutes. This Court's strict scrutiny cases, however, make clear that no deference is afforded to explicit state racial classifications:

> "Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures ... We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations."

City of Richmond v. J. A. Croson Co., 488 U.S. 469, 490-91 (1989); *see also Miller v. Johnson*, 515 U.S. 900, 922 (1995) ("When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied.").

Respondents are badly mistaken in characterizing this case as only a matter of state and local interest. Opp., p. 12. Elections and voting remain the province of state and local authorities unless and until they enact racial classifications that transgress the Fourteenth Amendment. Supreme Court review then becomes imperative.

Nor is it true that this case is limited to California. Opp., p. 12. If the decision below affording rational basis review to racial classifications were to stand, similarly fashioned race-based legislation in other states can be employed without proof of racial injury, need or justification. The direct conflict between the decision below and this Court's racial classification precedents is therefore a matter of national importance that warrants this Court's review.

IV. *SALERNO* IS INAPPLICABLE

Respondents erroneously suggest that review is not warranted because of possible constitutional concerns in its application, invoking *United States v. Salerno*, 481 U.S. 739 (1987). Opp., pp. 18-19. Yet the Act here is invalid on its face in all applications. *Salerno* is simply inapplicable.

Facial challenges are directed to the challenged statutory language. Petitioners assert that Section 14028(a), invalidating at-large election systems on proof of racially polarized voting alone without proof of a majority district, electoral defeat or racial injury, is unconstitutional on its face. That statute as written is invalid and thus cannot be applied to anyone. Respondents have not carried their burden to demonstrate that the statute has any conceivable valid application as written, nor can we conceive of one.

Petitioners are entitled to have Modesto's at-large election system adjudicated according to a valid rule of law, one that does not offend the Constitution. *See commentaries,*

e.g., Isserles, *Article: Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 363-64 (1998); Dorf, *Federal Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 238 (1994). Thus, in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), this Court invalidated a poll tax on voting without requiring proof that the plaintiffs in that case could not pay it. Rather, the Court invalidated the statute because voter qualifications "have no relation to wealth nor to paying or not paying this or any other tax." *Id.* at 666. The law was declared invalid as to all.

This Court has not applied or even mentioned *Salerno* in strict scrutiny racial classification cases such as *Croson; Adarand; Shaw v. Reno*, 509 U.S. 630 (1993); *Johnson v. California*, 543 U.S. 499 (2005); and *Parents. See Berkley v. United States*, 287 F.3d 1076, 1090 (Fed. Cir. 2002). The reason is that the challenged racial classifications are invalid as drawn without more if they are not narrowly tailored to promote a compelling state interest. That is what Petitioners seek here – invalidation of Section 14028(a) because it lacks findings, it invalidates at-large election systems solely on the basis of racially polarized voting without first requiring proof of racial injury and it was enacted for racial balancing purposes.

Salerno presents no bar to review.

V. THIS CASE IS NOT MOOT

Respondents urge the Court to deny review because the Petitioner City of Modesto has scheduled an advisory vote on district elections for the November, 2007 election. (Opp., p. 13). The vote in November is not binding on the City and obviously does not moot the Petition, whatever the outcome of the election. Nothing requires the City to put a

binding measure on district elections before voters, as the advisory election may fail. Even if a binding vote occurs, there is no certainty that voters would approve it. Modesto is a charter city and the election system can be changed only by approval of the voters. The Petition should not be denied merely because Modesto is exploring what it will do if review is not granted.

The Act is statewide in scope, the constitutional standard of review issue is ripe and properly before the Court and if its facial unconstitutionality is not resolved the Act will threaten all at-large election systems in California.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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